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No. 07-

In the Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition challenges a $17.5 million award of punitive damages for petitioners' failure to do more to prevent periodic releases of carbon black during the manufacturing process. There are no claims of physical injury, only property damage. And the compensatory damages of $1,915,000 are substantial by any definition: Among other things, they include the costs of remediating properties that tested negative for carbon black, reimbursement for a company's ordinary business debts (such as a mortgage and a truck loan), and compensation for the emotional distress allegedly suffered by the owner of the company.

The general question presented is whether the $17.5 million punitive award is unconstitutionally excessive under *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). More specifically, this case raises questions about the application of the three *BMW* guideposts, each of which has divided the lower courts:

1. Whether courts applying the reprehensibility guidepost should consider how the defendant's conduct compares to conduct in other punitive damages cases in determining whether the amount of punitive damages is out of proportion to the gravity of the offense.

2. Whether, and if so in what circumstances, a punitive/compensatory ratio in excess of 1:1 is allowable when the amount of compensatory damages is "substantial" and other forms of punishment and deterrence, including significant attorneys' fees for "bad faith" and extensive injunctive relief, have already been imposed.

3. Whether, in applying the comparable penalties guidepost, a reviewing court may disregard the most realistic legislative penalty and instead speculate about the remote possibility of a severe, yet unprecedented and extremely unlikely, fine.

RULE 29.6 STATEMENT

Petitioner Continental Carbon Co. is wholly owned by CCC USA Corporation, which is two-thirds owned by Petitioner China Synthetic Rubber Corporation and one-third owned by Taiwan Cement Corporation. Both China Synthetic Rubber Corporation and Taiwan Cement Corporation are publicly traded in Taiwan. No publicly owned company owns more than 10% of China Synthetic Rubber Corporation's or Taiwan Cement Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Continental Carbon Co. and China Synthetic Rubber Corp. (collectively "CCC") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 481 F.3d 1302. The order of the court of appeals denying rehearing (App., *infra*, 55a) is unreported. The orders of the district court denying petitioners' post-trial motions (*id.* at 33a-47a), entering injunctive relief (*id.* at 48a-54a), and entering final judgment on the claims submitted to the jury (*id.* at 56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2007, and a timely petition for rehearing was denied on May 18, 2007. Justice Thomas extended the time for filing a petition for writ of certiorari to August 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

O.C.G.A. § 13-6-11 and ALA. CODE § 22-22A-5(18)(c) are included in the appendix at 57a.

STATEMENT

Over the past decade and a half, this Court repeatedly has expressed concern about awards of punitive damages that, "today, may be many times the size of such awards in

the 18th and 19th centuries." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007). To assist courts in determining when a punitive award is unconstitutionally excessive, the Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio between the punitive and compensatory damages (or potential harm in the unusual circumstance of a thwarted attempt); and (iii) the difference between the punitive damages and the legislative and/or administrative penalties for comparable misconduct. *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574-85 (1996). And it has required "[e]xacting appellate review" of the trial court's analysis of these guideposts to ensure that the amount of punitive damages is "based upon an application of law, rather than a decisionmaker's caprice." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417-18 (2003) (internal quotation marks and alterations omitted).

Regrettably, lower courts often apply the *BMW* guideposts mechanically without considering this Court's broader concerns about the size of punitive awards, such as whether they are "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585), "extraordinary by historical standards" (*id.* at 594 (Breyer, J., concurring)), or excessive in relation to a "State's legitimate interests in punishing unlawful conduct and deterring its repetition" (*id.* at 568). Moreover, courts routinely misapply the guideposts, weakening their "constraining power to protect against serious and capricious deprivations [of property]" (*id.* at 590 (Breyer, J., concurring)). This case is emblematic. In affirming a $17.5 million punitive award that is over nine times the compensatory damages, while ignoring the punitive and deterrent effect of the compensatory damages, attorneys' fees, and injunctive relief, the Eleventh Circuit applied the *BMW* guideposts in a manner that deprived them of their "constraining power." Review is necessary because the Eleventh Circuit's decision is unfaithful to the Court's precedents and conflicts with numerous decisions applying those precedents.

1. CCC's operations. CCC owns a plant in Phenix City, Alabama, that manufactures carbon black. R52, 534. Carbon black is a highly engineered product that is manufactured by heating feedstock oil to a high temperature in a low-oxygen reactor. R218-19. The resulting product is smoke that includes both carbon black and waste gases. R84. The carbon black is separated from the gases, processed, and formed into small pellets for ease of handling and shipment. R217, 226.

Carbon black has many commercial applications. Its most popular use is in making tires. CCC also sells carbon black for use as pigment in rubber and plastic items, inks, and many other useful products. Dkt. 38, at 3.

While the plant originally had one production unit, Unit 1, CCC built a second production unit in 1999, Unit 2, to meet expanding demand for carbon black. R224. During construction, CCC worked with the Alabama Department of Environmental Management ("ADEM") to identify and install the best available pollution-control technology.[1] R221-22, 347, 563. For example, each unit has several large "bagfilter" compartments, each of which contains several hundred bags that collect the carbon black after it is produced. R217, 221, 559-60. A thermal oxidizer is designed to incinerate any particulate matter not captured by the bagfilters (including carbon black) at 1700 degrees Fahrenheit. R221, 332, 343. The gas stream that comes out of the thermal oxidizer is vented through a stack. R350. Electronic probes called Triboguards detect any solid particles in the stream and sound an alarm if anything is amiss so that employees can investigate. R223, 345-46, 350.

ADEM recognized that this technology, while the best available, was not perfect and issued a permit to CCC to emit

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[1] Under the Clean Air Act, State agencies—not industry—determine the best available pollution control technology. See *Alaska Dep't of Envtl. Conserv.* v. *EPA*, 540 U.S. 461, 468-69 (2004).

120 tons per year of particulate matter, including carbon black. R327-28, 937-38. Unfortunately, some carbon black emissions did occur: Unit 1 developed leaks (R167-68, 372, 425, 497, 1335, 1340), while Unit 2 had insufficient bagfilter capacity, causing premature bag failure (R71-75, 367-68).

Nevertheless, uncontradicted evidence showed that CCC identified and remedied the causes of emissions when they occurred (PX17) and repaired and replaced parts of its existing plant (R74-75, 167, 182-83, 385, 572). CCC also built new plant facilities, including two additional bagfilter compartments for Unit 2 in 2003. R75, 1361. These additional bagfilter compartments "pretty much" solved the Unit 2 problems. R1361.

A group of nearby property owners—a boat dealership, Action Marine, Inc.; its owner John Tharpe; the City of Columbus, Georgia; and city resident Owen Ditchfield—were dissatisfied with these measures. They claimed that carbon black had periodically escaped from CCC's plant and been carried by the wind onto their properties, causing a black discoloration.[2] And they wanted CCC to do more to remedy the emissions sooner. In particular, they wanted CCC to replace Unit 1 instead of trying to repair the leaks first. R167-68, 372, 425, 497, 1335, 1340. And they asserted that CCC waited too long to replace the Unit 2 bagfilter system. R71-75, 367-68.

2. Respondents sue CCC and receive a huge verdict. These property owners—respondents in this Court—eventually brought claims against CCC for negligence, nuisance, trespass, and wantonness under Georgia law. Respon-

[2] Action Marine claimed that its boats were discolored and that it was therefore losing customers. R1052-53. The City claimed that carbon black emissions had blackened the roof of the Civic Center and caused black streaking at nearby city facilities. R1010-11, 1224, 1230-32. Owen Ditchfield claimed that the material dirtied the paint on his houses and the finish on his vehicles. R1188-90.

dents sought recovery for their property damage, injunctive relief, punitive damages, and attorneys' fees for "bad faith" under O.C.G.A. § 13-6-11. They did not claim any physical illness or injury.[3]

CCC contested several elements of the various causes of action as well as the extent of respondents' damages: Several of the properties for which the City sought recovery tested negative for carbon black. R1447, 1613, 1795-96; R1448, 1794, PX104B-63; R1451-53, 1616, PX104A-2, 104B-21, DX162, at 5. Moreover, only tiny amounts of carbon black were present on all of respondents' other properties except one of Action Marine's boats. R1786-89, 1802-03, 1817, 1825, 1863-64; DX162. On these properties, microscopic examination revealed that other dark particles such as mold spores and pollen—not carbon black—were responsible for the discoloration. R1782-83, 1791-92.

The jury nevertheless returned a general verdict for respondents and awarded them $1,915,000 in compensatory damages: $45,000 to Ditchfield, $100,000 to Tharpe for emo-

[3] Moreover, there was no evidence that the carbon black emissions posed a health risk to the community. Though the Eleventh Circuit disagreed, its position was based on the erroneous belief that CCC's Material Safety Data Sheets ("MSDSs") proved that carbon black emissions were possibly carcinogenic to humans. App., *infra*, 24a & n.20. In fact, the MSDSs state that the U.S. National Toxicology Program and the U.S. Occupational Safety and Health Administration have *not* designated carbon black as a carcinogen. PX32-17. While one agency, IARC, has concluded that carbon black has possible carcinogenic effects based on rat inhalation studies, and therefore classified carbon black as a class 2-B carcinogen, even it acknowledged that "'*[t]here is inadequate evidence in humans for the carcinogenicity of carbon black.*'" *Id.* (emphasis added). Plaintiffs presented no evidence that either humans or animals could potentially get cancer or suffer other adverse health effects from the periodic, atmospheric releases of carbon black at issue here.

tional distress, $1.2 million to Action Marine for lost business value, and $570,000 to the City for remediation costs. Dkt. 216. The City's award included $132,350 for properties that did not test positive for carbon black. PX113, at 19-20; Appellants' Br. 17 n.2. And Action Marine's award included lost profits as well as $795,000 for payment of ordinary business debts, such as a mortgage and a truck loan, that Action Marine claimed it would have paid down with those profits but for the discoloration. R1111-16; PX79, Ex. 5. The jury also awarded respondents $17.5 million in punitive damages, as well as $1,294,000 in attorneys' fees based on a finding of "bad faith." Dkt. 216; Dkt. 217.

3. The district court enters judgment for respondents. The district court denied CCC's post-trial motions and entered judgment on the verdict. App., *infra*, 33a-47a. The court recognized that the $17.5 million punitive award was over nine times the compensatory damages and seventy times the maximum civil penalty of $250,000 under Alabama law (the state with regulatory authority over the plant). *Id.* at 45a-46a & n.6 (citing Ala. Code § 22-22A-5(18)(c)). But the court held that these disparities were permissible, relying primarily on *Johansen* v. *Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), a pre-*State Farm* case that allowed $4.35 million in punitive damages even though that amount "was around 100 times the amount of actual damages awarded by the jury" and "100 times greater than the maximum penalty that could have been imposed." App., *infra*, 45a-47a & n.6.

The district court also ordered extensive injunctive relief. App., *infra*, 48a-54a. CCC had to replace or repair substantial parts of the Unit 1 bagfilter system; submit to air and video monitoring; and file progress reports subject to court verification. *Id.* at 49a-53a. A CCC employee estimated that these measures would cost at least $4.2 million. R475-76.

4. The court of appeals affirms. CCC appealed to the Eleventh Circuit, which affirmed the judgment. App., *infra*,

1a-32a. As relevant here, the court concluded that CCC's conduct was "exceedingly reprehensible" and supported $17.5 million in punishment. *Id.* at 23a-26a. But the court admitted that it reached its reprehensibility conclusion without comparing CCC's conduct to the misconduct in other punitive damages cases, instead basing its holding "on the facts before us in this case alone." *Id.* at 25a-26a.

The court also held that a 5.5:1 ratio—which it reached by adding the $1,294,000 attorneys' fees award for "bad faith" to the compensatory damages of $1,915,000 to produce a total denominator of $3.2 million—was acceptable. *Id.* at 27a-29a. Relying on Ninth Circuit decisions, the court reasoned that while "ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process requirements," and "a 1:1 ratio [is] the general rule when substantial compensatory damages have been awarded," this case was "the rare exception" in which a higher ratio was allowed. *Id.* at 28a-29a & n.24 (citing *In re Exxon Valdez*, 472 F.3d 600, 624 (9th Cir. 2006); and *Planned Parenthood of Columbia/Willamette, Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), cert. denied, 547 U.S. 1111 (2006)).

Finally, the court held that Alabama Code § 22-22A-5(18)(c) provided fair notice of a $17.5 million punishment. App., *infra*, 29a-32a. As the court explained, that provision limited fines to $25,000 "per violation" and up to $250,000 "per order." *Id.* at 30a. But nothing in the statute, it noted, expressly precluded ADEM from issuing multiple orders. *Id.* at 30a-31a. Thus, the court believed that it was reasonable to assume that, "if Alabama citizens have found themselves the victims of [CCC's] malfeasance," ADEM would have issued repeated orders, ultimately fining CCC "several million dollars." *Id.* at 31a. Accordingly, it held that the $17.5 million punitive award satisfied due process. *Id.* at 31a-32a.

REASONS FOR GRANTING THE PETITION

This Court has long cautioned that "punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). In *BMW*, it adopted three guideposts to help courts identify when a "multimillion dollar penalty" is "grossly excessive" and a "lesser" award would adequately advance the State's interests in punishment and deterrence. 517 U.S. at 584-85.

Unfortunately, *BMW* did not have its intended effect. Hence, the Court was compelled to provide additional guidance in *State Farm*. Although it found State Farm's conduct "reprehensible," the Court held that "a more modest punishment" than the $145 million awarded by the jury "could have satisfied the State's legitimate objectives." 538 U.S. at 419-20. The Court suggested that, "in light of the substantial compensatory damages," a "punitive damages award at or near the amount of compensatory damages"—$1 million—was likely the constitutional maximum. *Id.* at 429.

Yet even *State Farm* did not stem the tide of large punitive awards. Thus, in 2006 this Court granted certiorari to review a $79.5 million punitive award. See *Philip Morris USA* v. *Williams*, 126 S. Ct. 2329 (2006). In *Philip Morris*, the Court agreed to consider whether: (i) the Due Process Clause prohibits juries in individual cases from punishing defendants for injuries suffered by non-parties; and (ii) the $79.5 million punitive award was unconstitutionally excessive. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007). Because the Court ruled for Philip Morris on the first issue, it did not need to reach the excessiveness issue. *Id.* at 1065.

This case offers a perfect opportunity to provide the guidance on the proper application of the *BMW* guideposts—and on the excessiveness inquiry more generally—that the lower courts sorely need but that the disposition in *Philip Morris* forestalled. The Eleventh Circuit's conclusion that a $17.5 million punitive exaction is constitutionally acceptable

is irreconcilable with the concerns about arbitrary punishments that this Court repeatedly has expressed. Moreover, that court's strained application of the *BMW* guideposts directly conflicts with numerous decisions by other federal circuit courts and state courts of last resort. The depth, breadth, and significance of these conflicts strongly support certiorari.

I. THE LOWER COURTS ARE SPLIT AND NEED GUIDANCE ON THE PROPER APPLICATION OF THE *BMW* GUIDEPOSTS.

The Eleventh Circuit's application of each *BMW* guidepost conflicts with numerous federal circuit court and state supreme court decisions. Review is necessary and appropriate because these issues that have divided the lower courts arise with regularity in punitive damages litigation.

A. There Is A Conflict Regarding Whether Reviewing Courts Should Consider The Full Spectrum Of Punishable Conduct When Applying The Reprehensibility Guidepost.

The first guidepost—the degree of reprehensibility– is "[t]he most important indicium of the reasonableness of a punitive damages award." *State Farm*, 538 U.S. at 419 (internal quotation marks omitted). Here, the Eleventh Circuit concluded that CCC's conduct was "exceedingly reprehensible." App., *infra*, 23a-26a. In so holding, the court expressly "declined [CCC's] invitation" to compare its conduct to that of defendants in other punitive damages cases. App., *infra*, 25a-26a. Instead, citing the three-Justice plurality's rejection of a "comparative approach" in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 458 (1993), the court based its reprehensibility "conclusion on the facts before us in this case alone." App., *infra*, 26a. The Sixth Circuit has likewise expressed "war[iness] of any attempt to graft our ruling here onto another set of facts" because of its perception that *TXO* forecloses a comparative approach. *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007).

But the *TXO* plurality did not affirmatively condemn comparisons with other cases; it merely refused to "enshrine" a comparative analysis as part of a "test." 509 U.S. at 458. Indeed, as the Eleventh Circuit acknowledged (App., *infra*, 26a), the plurality "[did] not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations." *Ibid.* (emphasis omitted). In any event, the plurality's decision not to embrace any particular "test" commanded only three votes, and the Court's punitive damages jurisprudence has since taken a different path. Of particular significance, the Court in *BMW* directed lower courts to apply three guideposts when reviewing a punitive award for excessiveness. 517 U.S. at 574-85. In describing the reprehensibility guidepost, the Court explained "that some wrongs are more blameworthy than others." *Id.* at 575. That is a tacit recognition that some comparison with the conduct in other cases is essential.

Moreover, as the Court later emphasized in requiring "*de novo*" application of the guideposts, "'assur[ing] the uniform general treatment of similarly situated persons * * * is the essence of law itself.'" *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). Disregarding the results in other cases is antithetical to the even-handed application of justice that this Court has required and is destined to lead to an upward spiral of punitive damages awards. As the Court has made clear, the reprehensibility guidepost is supposed to ensure that the amount of punitive damages is not out of proportion to "'the enormity of [the] offense.'" *BMW*, 517 U.S. at 575. That objective becomes illusory if courts persist in evaluating the offense in isolation instead of placing it on a spectrum of punishable conduct informed by other punitive damages cases. Cf. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007) ("The strength of an inference cannot be decided in a vacuum. The inquiry is inher-

ently comparative * * *."); *BMW*, 517 U.S. at 594 (Breyer, J., concurring) ("[a] punitive damages award of $2 million for intentional misrepresentation causing $56,000 of harm is extraordinary by historical standards").

Accordingly, the Eighth and Ninth Circuits and the California Supreme Court have recognized that the reprehensibility guidepost requires courts to compare the misconduct at issue to the conduct in other punitive damages cases—*i.e.*, to place the conduct on a spectrum of reprehensibility. See, *e.g.*, *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005) (misconduct in connection with the performance of "a socially valuable task" is less reprehensible than conduct serving no legitimate purpose, such as "intentional, repeated ethnic harassment"); *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (affirming $1.25 million punitive award for breach of fiduciary duty because the misconduct, "according to the hierarchy of reprehensiveness, was clearly more reprehensible than the conduct in [*BMW*], and is at a similar level to the conduct in *State Farm*"); *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (reducing punitive award from $1.7 million to $50,000 in part because the fraud at issue was "of relatively low culpability" compared to "the universe of cases warranting punitive damages under California law"); cf. *Goddard* v. *Farmers Ins. Co.*, 120 P.3d 1260, 1262, 1282-84 (Or. Ct. App. 2005) (reducing $25 million punitive award to $2,589,822 because defendant's "manifestly malicious and deceitful" misconduct fell in the middle of the egregiousness spectrum when compared to other cases), modified on reconsideration, 126 P.3d 682 (Or. Ct. App. 2006), rev. granted, 143 P.3d 239 (Or. 2006).

This conflict potentially affects every punitive damages case because all reviewing courts must apply the reprehensibility guidepost. The issue is also very significant in this case: Had the Eleventh Circuit been willing to compare CCC's conduct—the failure to do more to prevent periodic

releases of carbon black during the manufacturing process—to the conduct of defendants in other punitive damages cases, the outcome likely would have been different. CCC's conduct involved a lesser degree of reprehensibility because carbon black production is a "socially valuable" task. See *Bains*, 405 F.3d at 775. Moreover, other courts have reduced punitive awards to amounts well below $17.5 million even though the misconduct at issue was markedly more egregious than CCC's periodic failure to prevent carbon black releases.

In *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), for instance, the Eighth Circuit held that the defendant's "conduct was highly reprehensible":

> Pall Mall cigarettes were extremely carcinogenic and extremely addictive * * *; the sale of this defective product occurred repeatedly over the course of many years despite American Tobacco's knowledge that the product was dangerous to the user's health; and American Tobacco actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct [led to] a most painful, lingering death following extensive surgery.

Id. at 602-03. The Eighth Circuit nevertheless reduced the $15 million punitive award to $5 million. *Id.* at 603.

In *Planned Parenthood*, anti-abortion activists put up "WANTED" posters threatening doctors who provided abortions. 422 F.3d at 958. The risk of harm was so serious that the FBI "warned [the] physicians to purchase bullet proof vests." *Ibid.* Applying *State Farm*, the Ninth Circuit nevertheless reduced punitive awards totaling $109 million to just over $4.7 million. 422 F.3d at 963.

In *Eden Electrical, Ltd.* v. *Amana Co.*, 370 F.3d 824 (8th Cir. 2004), the district court could "hardly think of a more reprehensible case of business fraud." *Id.* at 828-29. Yet the Eighth Circuit affirmed the district court's determination that

the $17,850,000 punitive award was unconstitutionally excessive and had to be reduced to $10 million. *Ibid.*

And in *Kemp* v. *AT&T Co.*, 393 F.3d 1354 (11th Cir. 2004), AT&T was found to have participated in a "large-scale corporate" effort "to exploit customers who were unsophisticated and economically vulnerable" by misleadingly presenting gambling debts as "legitimate" long-distance phone charges. *Id.* at 1363. Despite evidence indicating that "AT&T intended to target financially vulnerable individuals" with its illegal gambling scheme (*ibid.*), the Eleventh Circuit reduced the punitive damages from $1 million to $250,000, concluding that even $250,000 would be "a meaningful deterrent to a corporation like AT&T." *Id.* at 1365; see also *Life Ins. Co.* v. *Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (reducing punitive damages from $15 million to $3 million where defendant engaged in pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women").

Under no stretch of the imagination can CCC's conduct—which did not cause physical injury or target vulnerable individuals—be placed in the same league of heinousness as the conduct of these other defendants. Review is necessary to clarify whether the Eleventh Circuit erred in disregarding the results in other cases, thereby allowing the aberrational award against CCC to stand.[4]

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[4] The Eleventh Circuit's reprehensibility assessment is flawed even if CCC's conduct is evaluated in isolation. First, the court stated that CCC "continued its course of action and inaction undeterred by both the prospect and reality of litigation." App., *infra*, 25a. But uncontradicted evidence showed that CCC identified and remedied the causes of emissions when they occurred, repaired and replaced parts of its existing plant, and built new facilities to curtail emissions—all before judgment was entered. See p. 4, *supra*.

Second, the court concluded that it was "of no consequence" "that Alabama permitted [CCC] to release carbon black into the atmosphere" because the permit did not allow for property dam-

B. There Is A Conflict Regarding The Maximum *Permissible Ratio When Compensatory Damages* Are "Substantial."

In *State Farm*, this Court explained that "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). Heeding this guidance, several courts, including the Sixth and Eighth Circuits, have reduced punitive awards to amounts at or near compensatory damages when the latter were "substantial." See, *e.g.*, *Bach*, 486 F.3d at 156 (6th Cir.) (reducing $2,228,600 punitive award for violation of Fair Credit Reporting Act to $400,000, the amount of compensatory damages, because "the plaintiff has received a substantial compensatory award, and a ratio of 1:1 or something near to it is an appropriate result"); *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (reducing $3 million punitive award for death caused by defective truck design to $471,258.26, the amount of compensatory damages);[5] *Boerner*, 394 F.3d at 603 (8th Cir.) (reducing ratio

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age. App., *infra*, 25a-26a n.21. But the existence of a permit to emit carbon black reduces CCC's culpability by undercutting the argument that simply letting emissions occur was reprehensible.

Third, the court suggested that the degree of reprehensibility was increased because of CCC's "willingness to elude accountability." *Id.* at 25a. It relied in part on evidence that CCC "apparently" was warned by ADEM prior to inspections. *Ibid.* But even if such warnings occurred, there was no evidence that CCC affirmatively sought them. Punishing a defendant for actions by a third party raises serious due process concerns. See, *e.g.*, *United States* v. *Ashland, Inc.*, 356 F.3d 871, 874 (8th Cir. 2004) (discussing "fundamental[] unfair[ness]" of "punishing a defendant based solely on the conduct of another party").

[5] The jury found 50% comparative fault; thus, the plaintiff received only $235,629.13. Using this figure as the denominator, one member of the two-judge majority treated the punitive/compensatory

from 3.7:1 to 1.2:1 where compensatory damages were $4,025,000); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004) (reducing $6,063,750 punitive award for racial harassment to $600,000, the amount of compensatory damages); *Jet Source Charter, Inc.* v. *Doherty*, 55 Cal. Rptr. 3d 176, 178 (Cal. Ct. App. 2007) (reducing $26 million punitive award for repeated breaches of fiduciary duty and fraud to $6.5 million because 1:1 is maximum ratio when the harm is economic, the plaintiff is not vulnerable, and the compensatory damages are "substantial").[6]

Other lower courts have refused to follow this guidance, however. The Ninth Circuit has held that, "in cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality." *Planned Parenthood*, 422 F.3d at 962. It allows even higher ratios if the behavior is more egregious. See *ibid.*; see also *In re Exxon Valdez*, 490 F.3d 1066, 1093-94 (9th Cir. 2007) (per curiam) (declaring 5:1 ratio permissible even though compensatory damages and settlement pay-

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ratio as being 2:1. *Clark*, 436 F.3d at 606-07. The other member of the majority believed that the full amount of compensatory damages should be used as the denominator and therefore considered the ratio to be 1:1. *Id.* at 613-14 (Kennedy, J., concurring).

[6] See also *Kent* v. *United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 959-60 (D.S.D. 2006), rev'd in part on other grounds, 484 F.3d 988 (8th Cir. 2007); *Casumpang* v. *Int'l Longshore & Warehouse Union, Local 142*, 411 F. Supp. 2d 1201, 1220 (D. Haw. 2005); *Ceimo* v. *Gen. Am. Life Ins. Co.*, 2003 WL 25481095, at *2 (D. Ariz. Sept. 17, 2003), aff'd, 137 F. App'x 968, 970 (9th Cir. 2005) (unpublished); *Walker* v. *Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2007); *Roby* v. *McKesson HBOC*, 2006 WL 3775897, at *19 (Cal. Ct. App. Dec. 26, 2006) (unpublished in relevant part), rev. granted, 156 P.3d 1014 (Cal. 2007); *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004) (unpublished).

ments totaled $513.1 million, because conduct was in "mid-range" on spectrum of reprehensibility). Likewise, the Federal Circuit has held that a 4:1 ratio is the "threshold where the punitive award may become suspect." *Rhone-Poulenc Agro S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (upholding 3.33:1 ratio where compensatory damages were $15 million). And several state supreme courts have allowed ratios above 4:1 even when the compensatory damages exceeded several hundred thousand dollars.[7]

The current case deepens this conflict. The compensatory damages of $1,915,000 are indisputably "substantial" and afford respondents "complete compensation" for their injuries. *State Farm*, 538 U.S. at 425-26. For example, one respondent recovered damages to remediate properties that tested *negative* for carbon black; another recovered damages to reimburse it for ordinary business debts (such as a mortgage and a truck loan); and a third recovered damages for the emotional distress of worrying about the harm to his business allegedly caused by carbon black discoloration. *See* p. 6, *supra*. Yet the $17.5 million punitive award is over nine times higher. Even if the $1,294,000 award of attorneys' fees for "bad faith" is added to the denominator, as the court of appeals held it should be, the ratio is still 5.5:1.

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[7] See *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting $9.9 million in punitive damages where compensatory damages were $1.1 million because "substantial compensatory damages do not always require low single-digit ratios"); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004) (upholding $25 million punitive award, even though compensatory damages were $5.1 million, because 5:1 ratio was not "breathtaking"); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004) (holding, on remand, that 9:1 ratio comported with due process despite compensatory damages of $1 million); *Trinity Evangelical Lutheran Church & Sch.-Freistadt* v. *Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (upholding $3.5 million punitive award that was over seven times the potential harm of $490,000).

Indeed, the Eleventh Circuit's treatment of the attorneys' fees implicates two additional splits. First, the courts are divided as to whether a reviewing court may enhance the denominator by the amount of attorneys' fees. In conflict with the Eleventh Circuit, the Utah Supreme Court has held that *State Farm* precludes doing so.[8]

Second, whether or not it is appropriate to include attorneys' fees in the denominator, the courts are in disarray regarding the significance of a large fee award to the excessiveness inquiry. Taking no account of the fact that an award of attorneys' fees has punitive and deterrent effects,[9] the Eleventh Circuit used the fee award to justify upholding an amount of punitive damages that it might otherwise have found excessive in relation to the compensatory damages.[10] By contrast, the D.C. Court of Appeals has held that, because substantial attorneys' fees include "'a certain punitive element[,]'" they "favor[] a lesser rather than greater award of

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[8] In *State Farm*, the plaintiff argued that the denominator should include over $800,000 in attorneys' fees and expenses in addition to $1 million in compensatory damages. Resp. Br., 2002 WL 31387421, at *17 n.5 (U.S. Oct. 17, 2002). This Court nevertheless stated that the ratio was 145:1 ($145 million to $1 million), not 80.5:1, the ratio if fees and expenses were included. 538 U.S. at 426. On remand, the Utah Supreme Court explained that "the considerable attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator." 98 P.3d at 419.

[9] See, *e.g.*, *City of Warner Robins* v. *Holt*, 470 S.E.2d 238, 240 (Ga. Ct. App. 1996) (recognizing that attorneys' fees awarded under Georgia law "may often have a somewhat punitive effect on the party against whom they are awarded" even if their primary purpose is compensatory).

[10] See App., *infra*, 27a (finding it unnecessary to decide whether 9:1 ratio would be constitutional).

punitive damages." *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003). Similarly, the California Court of Appeal recently held that a 1:1 ratio was the constitutional maximum because the "substantial" emotional-distress damages and attorneys' fees contained a "punitive element." *Walker* v. *Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2007). This Court's review is necessary to resolve these conflicts and provide guidance on the proper application of the ratio guidepost.

C. There Is A Conflict Regarding The Propriety Of Speculating About Severe, But Highly Unlikely, Legislative Fines When Applying The Comparable Penalties Guidepost.

This Court has instructed reviewing courts to consider legislatively established penalties for comparable conduct because principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). In addition, the magnitude of legislative penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and resources of expert regulatory agencies. As Justice Breyer has aptly put it in an analogous context, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring in part and concurring in the judgment).

Perhaps because this Court has not yet provided a detailed analysis of this guidepost, lower courts consistently have expressed confusion about its proper application. As the Third Circuit remarked: "[T]he Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in

doing so. We are similarly unsure as to how to properly apply this guidepost, and we are reluctant to overturn the punitive damages award on this basis alone." *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005) (citations omitted).

In particular, the lower courts are divided regarding whether it is appropriate to compare the punitive damages to theoretical maximum penalties that are rarely if ever imposed in practice, or whether courts instead must focus on the penalties that realistically could be anticipated for the conduct before them. Though this Court in *State Farm* rebuked the Utah Supreme Court for "speculat[ing] about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment" in the absence of any evidence that those fines realistically could have been imposed (538 U.S. at 428), some lower courts have disregarded this admonition when considering the relevance of highly severe—but also highly unlikely—penalties. See, *e.g.*, *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (noting that "[w]e are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license" even though there was no evidence that such a penalty was remotely possible for the conduct at issue); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. Jan. 12, 2004) (observing in insurance bad-faith case that "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which * * * could be worth hundreds of millions of dollars"); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 350 (Ark. 2004) (holding in case involving train accident caused by failure to clear vegetation near grade crossing that $25 million punitive award satisfied the third guidepost because it was "comparable" to "the total civil penalties authorized by law," which court determined to be $9.9 million by adding the maximum daily state and federal fines for overgrown vegetation and treating each day as a separate violation).

This case is a perfect example. In analyzing the third guidepost, the Eleventh Circuit relied on a theoretical maximum penalty that was virtually unthinkable in practice: While Alabama's environmental statute authorizes ADEM to impose fines of $25,000 per violation up to a total of $250,000 "per order," the court speculated that ADEM could have issued repeated orders, ultimately fining CCC "several million dollars." App., *infra*, 30a-31a (citing Ala. Code § 22-22A-5(18)(c)). Nothing in the record substantiates the court's assumptions. ADEM never issued any orders because of fugitive emissions by CCC. Moreover, there is no indication that ADEM ever had, ever would, or even could, issue multiple retrospective orders so as to evade the $250,000 limit on its power to punish. Indeed, while the court of appeals stated that "evidence in the record indicates that [CCC] did indeed violate conditions of its permit" (App., *infra*, 31a), there was no evidence quantifying particular emissions. Thus, as the court ultimately admitted, it was engaging in pure conjecture. See *ibid.* (court was not "capable of guessing as to the frequency of Continental's violations").

In contrast, the Sixth Circuit and other courts have focused on more realistic penalties grounded in the evidence before the court. In *Clark*, for instance, a design defect in a truck had contributed to a driver's death. 436 F.3d at 597. Under the version of 49 U.S.C. § 30165(a) in effect at the time, the National Highway Traffic Safety Administration ("NHTSA") could issue fines for design defects of $1,000 per vehicle, up to a maximum of $800,000 for a related series of violations. *Id.* at 608. The district court held that the third guidepost supported the $3 million punitive award because NHTSA could theoretically issue penalties above $800,000 or revoke the defendant's business license in extreme circumstances. *Ibid.* The Sixth Circuit reversed, noting that no evidence in the record showed that such severe penalties were realistic and citing *State Farm*'s warning against engaging in speculation. *Ibid.* The court proceeded to hold that the

"civil penalties that could be imposed for comparable conduct do[] not support the award." *Ibid.*

The Texas Supreme Court similarly refused to consider the possibility that a car dealer would lose its license due to the fraud at issue because the plaintiff "provide[d] no proof that such a sanction has ever been awarded in a case like this." *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 309 (Tex. 2006). Likewise, the Guam Supreme Court concluded that the "'*maximum* fine provided by the statute'" is irrelevant where it "bears no 'relation to the egregiousness of the [fraud in the] case.'" *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *16 (Guam Nov. 16, 2004). And the Arkansas Court of Appeals held that theoretically severe penalties, such as loss of license, had "no application" because there was no proof that a lesser sanction had been ineffective in the past, and "the record [did not] demonstrate conduct so egregious and so widespread that the civil penalty of business-closure was a real prospect" for the fraud at issue. *Jim Ray, Inc.* v. *Williams*, __ S.W.3d __, 2007 WL 1831790 (Ark. Ct. App. June 27, 2007); cf. *Leatherman Tool Group, Inc.* v. *Cooper Indus., Inc.*, 285 F.3d 1146, 1149 (9th Cir. 2002) (reducing $4.5 million punitive award to $500,000 on remand from this Court because, "even assuming that as a general matter 'severe' awards might be appropriate in some cases, [the plaintiff] has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a comparable case").

Like the conflicts involving the other *BMW* guideposts, this issue arises with considerable frequency in punitive damages litigation. Environmental cases are one example; often, there are high per-day penalties for statutory violations but no evidence as to the actual number of violations or of the relevant agency's actual fining practice. See, *e.g.*, *Johansen*, 170 F.3d at 1337; *City of Modesto Redevelopment Agency* v. *Dow Chem. Co.*, 2006 WL 2346275, at *14 (Cal. Super. Ct. Aug. 1, 2006) (unpublished). Insurance bad-faith

cases are another example; the statutory scheme often provides for a range of penalties, including the loss of the insurer's license. See, *e.g.*, *State Farm*, 538 U.S. at 428.

This issue also is very important. Many lower courts already tend to treat the comparable penalties guidepost as an inconsequential part of the punitive damages analysis. See, *e.g.*, *Exxon Valdez*, 490 F.3d at 1094 (noting that, "[i]n several recent decisions we have not discussed the [third guidepost] at all," and concluding that third guidepost supported $2.5 billion punitive award solely because "the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures") (citations omitted); *Kemp*, 393 F.3d at 1364 (the third guidepost "is accorded less weight in the reasonableness analysis than the first two guideposts"); *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (stating that statutory penalties have little relevance where they "were set at 'such a low level, there is little basis for comparing it with any meaningful punitive damage award'"); *Campbell*, 98 P.3d at 419 (holding, on remand, that a wide disparity between $9,018,780.75 punitive award and $10,000 maximum legislative penalty for comparable conduct was irrelevant because "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic"); cf. *Steel Techs., Inc.* v. *Congleton*, __ S.W.3d __, 2007 WL 1790599, at *10 (Ky. June 21, 2007) (concluding that the third guidepost supported $1 million punitive award even though maximum fine was $10,000 because the "difference [between the punitive award and maximum fine] is significantly less than that encountered in *Gore* and *Campbell*"). This guidepost will effectively become a nullity if courts can rely on high (but unlikely) theoretical maxima or assume away all possible limitations on the amount of fines, as the Eleventh Circuit did here. Review is necessary to make clear that the Eleventh Circuit should have focused on more realistic penalties.

II. THE ELEVENTH CIRCUIT'S DECISION IS REPRESENTATIVE OF A PERVASIVE FAILURE AMONG THE LOWER COURTS TO HEED THE CONCERNS UNDERLYING THIS COURT'S PUNITIVE DAMAGES CASES.

This case also exemplifies a tendency of many courts to apply the guideposts mechanically without considering the core constitutional problems that led this Court to address this subject in the first place. As this Court has recognized, punitive damages "serve the same purposes as criminal penalties, [but] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. Civil juries that are typically subject to few constraints, that lack the expertise of regulators, and that may even possess "biases against big business" (*ibid.*) can all too easily impose multi-million-dollar punitive awards that are "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585) and that dwarf "the size of such awards in the 18th and 19th centuries," even after adjustment for inflation (*Philip Morris*, 127 S. Ct. at 1064).

The Court accordingly has explained that "[i]t should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. Even if some punitive damages are appropriate, the reviewing court should consider whether "a less drastic remed[y] could be expected to achieve [adequate punishment and deterrence]." *BMW*, 517 U.S. at 584.

This guidance reflects the basic understanding that, while punitive damages are an important means of achieving punishment and deterrence, they are not the only way to accomplish those objectives. "Punitive damages aside,"

"[d]eterrence * * * operates through the mechanism of damages that are *compensatory*." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986) (emphasis in original).[11] Awards of attorneys' fees also "provide significant deterrence." *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting). And so does injunctive relief. Cf. *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (various costs incurred by defendant as a result of its conduct "should be considered as part of the deterrent already imposed").

Likewise, compensatory damages and awards of attorneys' fees often can have a punitive effect. See *State Farm*, 538 U.S. at 426 ("Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element."); pp. 17-18, *supra*.

The guideposts announced in *BMW* and refined in *State Farm* were supposed to help courts determine when a punitive award exceeds the amount needed to punish and deter and therefore constitutes an arbitrary deprivation of property. Some courts have kept this ultimate inquiry in mind, reducing large punitive awards to an amount at or below the compensatory damages or throwing them out entirely after taking into account the punitive and deterrent effects of the compensatory award and other obligatory payments.

In *Inter Medical Supplies, Ltd.* v. *EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), for instance, the jury

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[11] See also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

awarded over $100 million in punitive damages and $48 million in compensatory damages for breach of contract and fraud. The district court reduced the punitive award to $50 million. *Id.* at 454. The Third Circuit held that the reduced punitive award was still unconstitutionally excessive. *Id.* at 467. As the court explained, the plaintiff was not "weak" and "the harm inflicted on [it] was economic * * * and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety.'" *Ibid.* Moreover, "large compensatory damages have been awarded." *Ibid.* The court accordingly held that $1 million was the constitutional maximum because a greater amount was "not 'reasonably necessary to punish and deter.'" *Id.* at 470 (quoting *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991)).

Similarly, in *Chicago Title Insurance Corp.* v. *Magnuson*, 487 F.3d 985 (6th Cir. 2007), the jury awarded $32.4 million in punitive damages and $10.8 million in compensatory damages for tortious interference with a contract. The Sixth Circuit held that a new trial was required on damages, but no punitive damages would be allowed. *Id.* at 998. The court reasoned that there "were no physical injuries or threat to personal safety as a result of [the misconduct]" or any evidence of recidivism. *Id.* at 1001. And the plaintiff "was not a financially vulnerable victim." *Ibid.* Thus, the court held, while there was evidence of malice, this evidence did not by itself prove that "'the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.'" *Ibid.* (quoting *State Farm*, 538 U.S. at 419).

Likewise, in *Pichler* v. *UNITE*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), a federal district court in Pennsylvania denied a request for punitive damages under the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2724. There, a union had violated DPPA by recording certain license plate numbers to get the owners' addresses from motor vehicle records. *Pichler*, 457 F. Supp. 2d at 530. The court held that

punitive damages were inappropriate, even if the union's behavior was willful and reckless. *Id.* at 531. The union had discontinued the illegal activity before judgment and knew that it would have to pay "costly damage awards" for future DPPA violations. *Id.* at 532. This sufficed "to achieve deterrence without imposing punitive damages." *Ibid.* Moreover, the statutory damages were over $4 million, and the attorneys' fees and costs were likely to be "considerable." *Ibid.* These awards would "amply punish[]" the union for its misconduct. *Ibid.* Thus, "mindful" of *State Farm*'s admonition that punitive damages should be awarded only if necessary to achieve punishment or deterrence (*id.* at 531), the court disallowed punitive damages (*id.* at 532).

Regrettably, these decisions are in the minority: Many lower courts have misunderstood (or even affirmatively flouted) this Court's guidance and upheld multi-million-dollar punitive awards even when compensatory damages were "substantial" and "a more modest punishment" would have sufficed. *State Farm*, 538 U.S. at 419-20, 425. The Utah Supreme Court's decision on remand in *State Farm* is illustrative. Though this Court suggested that a punitive award "at or near" the $1 million compensatory award was the constitutional maximum (*id.* at 429), the Utah Supreme Court upheld more than $9 million in punitive damages (98 P.3d at 413).

Another example is the Ninth Circuit's recent decision in *Exxon Valdez*. There, the court allowed $2.5 billion in punitive damages to a class of fishermen following the Exxon Valdez tanker disaster—"the largest punitive damages award affirmed by a federal court" (490 F.3d at 1071 (Kozinski, J., dissenting from denial of rehearing))—even though Exxon spent $2.1 billion remediating the harm, paid $513.1 million in compensatory damages and settlement payments to the plaintiffs, and paid the United States and Alaska $125 million in fines and $900 million for damage to the environment. The dissenting judge, meanwhile, would have upheld the entire $4.5 billion punitive award because it was a single-digit

multiple of the compensatory damages and settlement payments. See *id.* at 1102 (Browning, J., dissenting).

The present case is another excellent example. The $17.5 million punishment here is "many times the size of [punitive] awards in the 18th and 19th centuries" (*Philip Morris*, 127 S. Ct. at 1064) and "is tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585). The most realistic comparable penalty is no more than $250,000 (1/70th of the punitive award). See p. 20, *supra*. And by no means does the misconduct here fall in the upper echelons of reprehensibility. See pp. 11-13, *supra*. Finally, the jury awarded substantial compensatory damages of $1,915,000 as well as $1,294,000 in attorneys' fees for "bad faith," while the district court ordered extensive injunctive relief that has cost CCC millions more. These awards and costs provide significant punishment and deterrence in their own right and eliminate the need for $17.5 million in "further sanctions." *State Farm*, 538 U.S. at 419; see also pp. 23-24, *supra*. The Eleventh Circuit nevertheless upheld the entire punitive award by manipulating the ratio of punitive to compensatory damages to get it into the mid-single digits and reading *State Farm* to allow such ratios whenever there is a "finding of reprehensibility" (App., *infra*, 29a).

These examples are far from unique: Numerous other courts also have missed this Court's point, giving single-digit ratios a constitutional "free pass" even when the compensatory damages exceeded several hundred thousand dollars and a lower punitive award might have satisfied the objectives of punishment and deterrence.[12]

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[12] See, *e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 2007 WL 627834, at *7 (6th Cir. Feb. 27, 2007) (unpublished) (upholding $5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of $884,291.18 because it was "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004)

The fundamental error of these courts is their belief that the second guidepost is not merely one of several possible indicia of excessiveness, but instead is a safe harbor for massive exactions. That premise seriously misunderstands this Court's precedents. *BMW* indicates that "[i]n most cases, the

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(holding that $2 million punitive award was permissible, even though "the compensatory damages award [of $500,000] is substantial * * * and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Haslip*); *Rhone-Poulenc*, 345 F.3d at 1372 (Fed. Cir.) (taking no account of the absolute amount of the punitive award and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $2.6 million punitive award where compensatory damages were $260,000, because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding approximately $2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of $500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which the Supreme Court has found to be 'instructive'"); *Greenberg*, 91 F. App'x at 542 (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 361 (Ark. 2003) (allowing $21 million punitive award that was 4.2 times the remitted compensatory damages of $5 million, because a ratio of 4.2:1 is not "breathtaking"); *Seltzer*, 154 P.3d at 611 (Mont.) (discussed above at p. 16 n.7); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003).

ratio will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*." 517 U.S. at 583 (emphasis added). It does not say that, if the ratio is modest, the punitive award is perforce permissible. Rather, as discussed above, *BMW*, *State Farm*, and *Philip Morris* all suggest a broader concern with the risk of arbitrariness that arises when the *absolute* amount of punitive damages exceeds the fine that would be imposed in a criminal proceeding attended by full criminal safeguards or in an administrative proceeding supervised by an expert agency.

This Court's cases also reflect the paramount principle that no award should be greater than reasonably necessary to serve the State's goals of deterrence and retribution. Application of that limiting principle necessarily entails considering the deterrent effect of other forms of liability imposed upon the defendant as a consequence of its punishable conduct. The courts that treat the ratio guidepost as a safe harbor have lost sight of this critical consideration entirely.

Because the Eleventh Circuit committed precisely that error here, review is warranted to make clear that a single-digit ratio is not a free pass. This case presents an excellent opportunity to remind the lower courts that they must scrutinize the *absolute* size of punitive awards to ensure that fines that could or would never be imposed by a criminal sentencer or expert administrative agency are not levied through the civil process with its comparatively *weaker* protections and that, in determining whether an award is excessive, they must take account of other deterrents faced by the defendant.

III. THIS COURT SHOULD GRANT PLENARY REVIEW IN BOTH THIS CASE AND *EXXON VALDEZ* OR, ALTERNATIVELY, GRANT REVIEW IN ONE AND HOLD THE OTHER.

As discussed above, the Eleventh Circuit's analysis of the ratio and reprehensibility guideposts relied on the Ninth Circuit's decision in *Exxon Valdez*. App., *infra*, 26a, 29a.

Exxon has recently filed a petition for certiorari, arguing, among other things, that the Ninth Circuit's treatment of the ratio and comparative penalties guideposts was fundamentally unsound. See *Exxon Shipping Co.* v. *Baker*, No. 07-219. Given the similar issues raised by these cases, the Court should grant plenary review in both to provide maximum guidance to the lower courts. In recent years, this Court has followed this practice in cases involving constitutional challenges to school assignment plans,[13] criminal sentencing,[14] and religious displays.[15] Granting both petitions is especially warranted here because, as in *Philip Morris*, Exxon has raised issues that, if decided in its favor, would make it unnecessary for this Court to reach Exxon's excessiveness arguments.

At minimum, the Court should grant review in one of the cases and hold the other. See Robert L. Stern et al., SUPREME COURT PRACTICE § 4.16, at 255 (8th ed. 2000) ("Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[13] *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 126 S. Ct. 2351 (2006); *Meredith* v. *Jefferson Cty. Bd. of Educ.*, 126 S. Ct. 2351 (2006).

[14] *Rita* v. *United States*, 127 S. Ct. 551 (2006); *Claiborne* v. *United States*, 127 S. Ct. 551 (2006).

[15] *McCreary Cty.* v. *ACLU*, 543 U.S. 924 (2004); *Van Orden* v. *Perry*, 543 U.S. 923 (2004).

Respectfully submitted.

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AUGUST 2007

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APPENDIX A

United States Court of Appeals, Eleventh Circuit.
ACTION MARINE, INC., John Tharpe, et al., Plaintiffs-Appellees,
v.
CONTINENTAL CARBON INCORPORATED, China Synthetic Rubber Corporation, Defendants-Appellants.
No. 06-11311

March 21, 2007

Before DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

DUBINA, Circuit Judge:

Appellants, Continental Carbon Co., Inc. ("CCC"), and its parent company, China Synthetic Rubber Corp. ("CSRC") (collectively, "Continental"),[1] defendants in the underlying lawsuit, appeal the district court's denial of their post-trial motion for judgment as a matter of law or, in the alternative, a new trial or, in the alternative, an amendment of the final judgment (hereinafter "post-trial motion"). Having reviewed the parties' briefs and the evidence in the record, and with the benefit of oral argument, we affirm the district court's order and the judgment entered on the jury's verdict.

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* Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

[1] CSRC's relationship with CCC was the subject of some dispute during this litigation, including the trial; however, in this appeal, CSRC does not challenge the district court's finding that it is CCC's parent corporation, and CSRC does not now deny making decisions that exposed it to liability in the instant case. Nor do the defendants contend that information known by CCC's management should not be imputed to CSRC.

I. BACKGROUND

A. *Facts*

Continental owns and operates a manufacturing plant in Phenix City, Alabama, that produces carbon black, a substance the company describes as follows:

> a highly engineered product manufactured by heating feedstock oil to a high temperature in a low-oxygen reactor. The resulting product is smoke that includes both carbon black and waste gases. The carbon black is separated from the gases, processed, and formed into small pellets for ease of handling and shipment. [Continental] sells carbon black for use in making tires, rubber and plastic items, inks, and other . . . products.

[Appellants' Br. at 3 (citations to the record omitted)].

According to trial testimony, the separating process occurs in stages using filters located in what is known in the industry as bagfilter compartments. Pressurized smoke carries carbon black through the compartments, where the bagfilters capture the carbon black. In a closed system such as exists in the Phenix City plant, if everything is working perfectly, no carbon black should escape, and the remaining gasses are expelled through exhaust towers.

Originally, the Phenix City plant housed one production unit ("Unit 1"). Although Continental received complaints from neighboring property owners regarding carbon black emissions from this unit, the damage giving rise to the present lawsuit occurred in conjunction with Continental's efforts to double the plant's production by commissioning a second unit in 1999 ("Unit 2"). Along with the construction of Unit 2, Continental installed a thermal oxidizer for the purpose of combusting any carbon black particles that escape either production unit before the air emanating from the bagfilter compartments is expelled.

The appellees (collectively, "the property owners"), which include the City of Columbus, Georgia ("the City"), own property located across the Chattahoochee River and within approximately 1 1/2 miles from Continental's Phenix City plant.[2] The property owners, all of whom are Georgia citizens, also include Action Marine, Inc. ("Action Marine"), which during the relevant time operated a retail boat sales and maintenance business along the river; John Tharpe ("Tharpe"), Action Marine's sole shareholder and principal agent; and Owen Ditchfield ("Ditchfield"), who owns a residence and rental home in the area.

According to the property owners, the Phenix City plant repeatedly emitted carbon black into the air, which then carried the pollutant, known to be oily, adhesive, and penetrating, onto their properties, thereby darkening them. Specifically, the City contends that the carbon black damaged the Columbus Civic Center both externally and internally via the facility's air intake system. Other City-owned properties allegedly damaged include recreational facilities located in the City's South Commons Sports and Entertainment Complex as well as Rigdon Park. In pursuing this civil action, the City sought damages for cleanup and monitoring costs. Ditchfield sought damages for cleanup costs, diminution of property value, and emotional distress in connection with carbon black contamination of both of his properties.

Action Marine alleges that the carbon black damaged its inventory of boats to such an extent that the company was forced to sell those it could at a loss. Creditors eventually repossessed Action Marine's boat inventory, which Tharpe had personally guaranteed, and the business shut down. Action Marine sought damages to recover for the lost value of its business.

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[2] Some of the properties are only approximately a 1/2 mile from Continental's Phenix City plant.

When Action Marine's creditors failed to recoup all that was owed from the company, they pursued deficiency judgments against Tharpe personally. To make matters worse, unable to return customers' boats in a clean condition and thought by some to be selling used boats as new, Tharpe became the butt of jokes among the fishermen who had formerly patronized his business. Tharpe therefore sought damages for emotional distress and loss of reputation.

Importantly, the property owners accused Continental of intentionally damaging their properties. They claimed that Continental chose to continue operating its Phenix City plant despite knowing that the plant's constant leaks were polluting their properties. Rather than fix the leaks, the property owners contend, Continental engaged in a strategy of denial, deception, and subterfuge. Therefore, the property owners sought punitive damages.

B. *Procedural History*

Alleging diversity jurisdiction pursuant to 28 U.S.C. § 1332 (2000), Action Marine and Tharpe originally filed this lawsuit as a class action stating common law tort claims of negligence, wanton conduct, breach of duty to warn, fraud, misrepresentation, deceit, nuisance, trespass, and strict liability. In addition to Continental, named defendants included Taiwan Cement Corp. ("Taiwan") as well as Charles Barry Nicks ("Nicks") and Todd Miller ("Miller"), both individually and in their representative capacity as agents of Continental.

Eventually, the City, Ditchfield, and Phillips Homes, Inc. ("Phillips"), were added as plaintiff class representatives, but the district court subsequently denied class certification. The district court then granted summary judgment in favor of Taiwan and the individual defendants, Nicks and Miller, on all claims against them. The court also granted summary judgment in favor of the remaining defendants on the claims of fraud, misrepresentation, deceit, and strict liability as well

as the City's and Action Marine's claims for emotional distress. Phillips stipulated to a dismissal of its claims without prejudice, and the remaining plaintiffs acquiesced in the dismissal of the claim alleging a breach of a duty to warn. Therefore, the lawsuit proceeded to trial on the property owners' claims of negligence, wanton conduct, nuisance, and trespass.

After a 10-day trial, an Alabama jury returned a verdict in favor of the property owners on all claims and determined that Continental's actions warranted punitive damages. The jury awarded compensatory damages in the amounts of $45,000 to Ditchfield; $100,000 to Tharpe; $570,000 to the City; and $1.2 million to Action Marine for a total of $1,915,000. The jury also awarded $1,294,000 in attorney fees and assessed punitive damages at $17.5 million.

Following entry of the final judgment on the jury's verdict, Continental timely filed its post-trial motion challenging the sufficiency of the evidence presented in support of the tort claims as well as the amount and propriety of the compensatory and punitive damages awarded. Prior to ruling on the motion, the district court determined that the property owners were entitled to permanent injunctive relief, to which the parties later consented. Approximately six months after entry of final judgment on the claims for injunctive relief, the district court denied Continental's post-trial motion. Continental now appeals that decision.[3]

II. ISSUES

1. Whether the evidence was sufficient to reasonably infer that carbon black was a cause-in-fact of the alleged discoloration.

2. Whether the evidence was sufficient to reasonably infer that Continental acted with the mental state required by

[3] Continental concomitantly appealed the award of injunctive relief; we have already dismissed that aspect of the appeal as untimely.

Georgia law to prove the property owners' claims and lift Georgia's statutory cap on punitive damages awards.

3. Whether the compensatory damages awarded to Action Marine were improper.

4. Whether Tharpe, as personal guarantor of Action Marine's debt and its principal agent, may pursue a claim against Continental for emotional distress and/or loss of reputation.

5. Whether the punitive damages award was unconstitutionally excessive.

III. STANDARDS OF REVIEW

We review the "denial of a motion for judgment as a matter of law *de novo*, and will reverse only if 'the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict.'" *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 n. 12 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2967 (2006). *De novo* review is the proper standard also for reviewing the district court's denial of judgment as a matter of law with respect to the claims for punitive damages. *Boyd v. Homes of Legend, Inc.*, 188 F.3d 1294, 1298 n. 9 (11th Cir. 1999) (noting that the issue "presents a pure question of law"); *see also Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000).

The district court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1247 (11th Cir. 2001). "Deference to the district court 'is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed,'" as in this case. *Id.* at 1247-48 (quoting *Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987)).

Finally, the district court's decision to sustain the amount of compensatory and punitive damages awards pursuant to state law is reviewed for "clear abuse of discretion."

Middlebrooks, 256 F.3d at 1249. Its decision that the punitive damages award does not run afoul of the federal Constitution, however, is subject to *de novo* review, though we "defer to the District Court's findings of fact unless they are clearly erroneous." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 440 n.14, 121 S. Ct. 1678, 1685-86, 1688 n.14 (2001).

IV. DISCUSSION

A. *Causation*

Continental contends that the evidence at trial was insufficient to support an award with respect to any of the property owners' tort claims. Focusing solely on the scientific evidence offered through the parties' experts, Continental argues that the property owners failed to prove that carbon black, as opposed to other ostensibly dark substances, caused any of the damage alleged. Alternatively, according to Continental, the scientific evidence similarly failed to demonstrate that the damage attributable to carbon black was "substantial," which Continental argues is required to prove the trespass and nuisance claims.

1. *In General*

According to Continental, chemical analyses conducted by the parties' experts failed to establish the presence of any carbon black on several of the City's properties at issue and, with respect to all but one of the remaining properties, established a concentration of less than one percent of the total dark material on the property. Consequently, Continental contends, the testing proved at most that carbon black caused *de minimis* damage.

At oral argument, the property owners conceded that two of the properties allegedly damaged, for which the jury awarded compensatory damages, tested negative for carbon black but contended nonetheless that the location of these two properties and the similarity between their discoloration and that of the neighboring properties that tested positive for

carbon black allow for an inference that carbon black caused the damage alleged.[4] The property owners rely on circumstantial evidence as well to counter Continental's claim that the positive test results revealed only trace amounts of carbon black.

The scope of our inquiry is defined by the arguments raised in the parties' briefs. Importantly, Continental does not dispute that all of the properties at issue were discolored and does not contend that the discoloration itself was insubstantial. Nor does Continental contend that the observable discoloration of the properties differed materially from one property to another. Furthermore, Continental does not attempt to convince us that the discoloration was not *suggestive* of carbon black.[5] Instead, Continental contends that no reasonable

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[4] The property owners focus on the issue of proximate cause. Continental's relevant arguments are limited to the issue of factual causation, however, and Continental actually acknowledges that cases addressing the issue of proximate cause "are inapposite." [Reply Br. at 7 n.6]. Therefore, we are concerned only with factual causation.

[5] Continental denies the ability to accurately identify carbon black with the naked eye; however, evidence in the record includes contradictory testimony from CCC employees. For example, Ng-Leng Lee, a plant manager for CCC and at one time plant manager in Phenix City, testified at his deposition that he believed CCC employee Greg Johnstone, who had reported a complaint of carbon black fallout, was capable of recognizing carbon black pollution upon seeing it. In addition, Nicks testified that he paid a car dealership with his own money to have cars cleaned after inspecting the vehicles and satisfying himself (though not to a scientific certainty) that the cars had been blanketed with carbon black from the Phenix City plant. Also, the property owners' microscopist, Garth Freeman, Ph.D., who specializes in carbon analysis, testified that the effects of carbon black deposits are visible without a microscope and "can form a comet appearance when it lands on material, and so in some circumstances there are physical appearances

fact finder could conclude that the discoloration was in fact caused by carbon black without a chemical analysis establishing the presence of carbon black in such concentrations as to compel the conclusion that carbon black, and nothing else, caused the alleged discoloration.

Our substantive legal analysis in this diversity case is governed by Georgia law, which provides that "[a]s a general rule, issues of causation are for the jury to resolve and should not be determined by a trial court as a matter of law except in plain and undisputed cases." *Ogletree v. Navistar Int'l Transp. Corp.*, 535 S.E.2d 545, 548 (Ga. Ct. App. 2000).

> With respect to factual causation . . . [, while] a reasonable inference sufficient to create a trial issue of fact cannot be based on mere possibility, conjecture, or speculation . . . [, t]he plaintiff [need only] . . . introduce evidence which affords a *reasonable basis* for the conclusion that it is more likely than not that the conduct of the defendant was *a* cause in fact of the result.

Id. (citations & quotations omitted) (emphasis added).

Viewed in the plaintiffs' favor, the evidence at trial, which included numerous documents and photographs as well as testimony from Ditchfield, Tharpe, the Mayor of Columbus, employees (past and present) of CCC, and experts in microscopy, air quality, and wind direction modeling, tended to show that (1) Continental's Phenix City plant emitted carbon black on numerous, perhaps innumerable, occasions during the relevant time period; (2) wind carrying carbon black from the Phenix City plant frequently blew toward the property owners' properties; (3) the properties were in close proximity to the plant; (4) the properties all were similarly discolored; and (5) the dark substance on the properties was at least

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of the way carbon black might deposit that would strongly indicate that that was carbon black." [Trial Tr. at 862].

reasonably suggestive of carbon black. Furthermore, most of the samples the property owners' expert obtained from the properties tested positive for carbon black, and the properties that tested negative were located immediately adjacent to properties with positive test results.

Surely a fact finder would welcome a chemical analysis establishing to a scientific certainty the presence and precise concentration of the pollutant on the properties allegedly damaged. In the instant case, the jury was free to hold the property owners accountable for failing to provide such certainty, but Continental has failed to cite any Georgia case that requires the property owners to establish scientific certainty.[6] We conclude that such precision is not necessary in this case. The evidence in the record provides a reasonable basis for concluding that Continental's carbon black caused the discoloration alleged.[7] Georgia law requires nothing more.

2. *Substantial Damage*

Continental contends that the property owners cannot succeed on their trespass and nuisance claims unless they can prove that the damage caused by carbon black was "substantial." [Appellant's Br. at 20]. We do not need to decide whether Continental's view of Georgia law is correct.

As already noted, Continental does not contend that the discoloration alleged by the property owners was insubstantial. Relying again on the results of the microscopic analyses

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[6] *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1567, 1570-71 (N.D. Ga. 1995), the case on which Continental primarily relies, is inapposite because the *Satterfield* court relied on a lack of evidence, generally, and specifically noted the lack of any expert testimony whatsoever regarding the issue of causation.

[7] We note that the only other circuit to address a similar argument in a case factually on point is in agreement. *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 173-74 (5th Cir. 1997) (concluding that scientific testing was not required for a jury to infer the presence of carbon black).

conducted by the parties' experts, Continental merely contends that the property owners failed to demonstrate that carbon black was the cause of this damage. Because we have already determined that the property owners' circumstantial evidence was sufficient to prove that carbon black caused the discoloration, it follows that the evidence also was sufficient to prove that carbon black caused substantial damage to all of the properties. *Holman v. Athens Empire Laundry Co.*, 100 S.E. 207, 210 (Ga. 1919) (holding that for smoke to constitute a nuisance "it must be such as to produce a visible, tangible, and appreciable injury to property").

B. *Continental's Culpability*

Continental contends that the evidence was insufficient to satisfy the scienter requirements of the property owners' wanton conduct, trespass, and punitive damages claims as well as that which is necessary to overcome Georgia's cap on punitive damages. The latter standard requires a showing of "specific intent to cause harm" and thus erects the highest scienter obstacle the property owners needed to overcome.[8]

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[8] "[W]anton conduct is that which is 'so reckless or so charged with indifference to the consequences . . . as to justify the jury in finding a wantonness equivalent in spirit to actual intent.'" *Hendon v. DeKalb County*, 417 S.E.2d 705, 712 (Ga. Ct. App. 1992) (quoting *Truelove v. Wilson*, 285 S.E.2d 556, 559 (Ga. Ct. App. 1981)), *quoted in Chrysler Corp. v. Batten*, 450 S.E.2d 208, 212 (Ga. 1994). Trespass to personal property requires a showing of willful damage, O.C.G.A. § 51-10-6(a) (2000), which equates to an "actual intention to do harm or inflict injury." *Hendon*, 417 S.E.2d at 712. A showing of either willfulness or wantonness is sufficient to satisfy the standard for awarding punitive damages. O.C.G.A. § 51-12-5.1(b) (2000). We note also that the property owners must prove their entitlement to punitive damages with clear and convincing evidence. O.C.G.A. § 51-12-5.1(b).

Continental has waived its argument on appeal that, under Georgia law, the tort of wanton conduct applies only in conjunction with a risk to "human life." [Appellant's Br. 12]. Continental

O.C.G.A. § 51-12-5.1(f), (g) (2000). A showing of specific intent to cause harm necessarily would satisfy the other scienter requirements; therefore, we begin our analysis with Continental's argument that Georgia's statutory cap limiting punitive damages requires us at least to grant a remittitur. Because we conclude from the record that the evidence was sufficient to prove that Continental acted with specific intent to cause harm, it is unnecessary to discuss Continental's arguments concerning the other scienter requirements.

Preliminarily, we recognize that an appellant challenging a jury finding regarding an actor's state of mind faces a formidable hurdle. We long ago cautioned courts in granting judgment as a matter of law "when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind." *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970).[9] Accordingly, we afford great deference to the jury's relevant conclusions as well as those of the district judge first asked to overturn the jury's finding.

1. *The Meaning of Specific Intent to Cause Harm*

By statute, Georgia caps punitive damages at $250,000 per plaintiff unless "it is found that the defendant acted, or failed to act, with the specific intent to cause harm." § 51-12-5.1(f), (g); *see also Bagley v. Shortt*, 410 S.E.2d 738, 739

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failed to object to the district court's relevant jury instruction or raise this argument before the district court in its post-trial motion. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331-35 (11th Cir. 2004) (discussing this circuit's frequently applied rule that we will not consider "an issue . . . raised for the first time in an appeal").

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

(Ga. 1991) (holding that the cap establishes a limit on the amount that can be awarded "*any one plaintiff*"). Reading into the term "specific intent" a requirement that the property owners demonstrate that Continental acted for the sole nefarious purpose of injuring them, both Continental and the U.S. Chamber of Commerce ("Chamber"), as *amicus curiae*, contend that the property owners fell short. Continental has waived a key aspect of this argument, however.

At trial and without objection, the district court instructed the jury that "[s]pecific intent to cause harm is where the actor desires to cause the consequences of his act or where the actor believes that the consequences of his act are substantially certain to result from [it]." [Trial Tr. 2,027]. This language reflects, *verbatim*, the definition adopted by the Georgia Court of Appeals, which equates specific intent in the punitive damages context to intent as defined in the Restatement (Second) of Torts. *See J.B. Hunt Transport, Inc. v. Bentley*, 427 S.E.2d 499, 504 (Ga. Ct. App. 1992); *Viau v. Fred Dean, Inc.*, 418 S.E.2d 604, 608 (Ga. Ct. App. 1992); Restatement (Second) of Torts § 8A (1965); *see also* Council of Superior Court Judges, Georgia Suggested Pattern Jury Instructions, Vol. I: Civil Cases, § 66.711 (4th ed. 2004) (suggesting the same definition as that the district court utilized in this case and the Georgia Court of Appeals utilized in *Bentley* and *Viau*).

Continental now contends that specific intent requires something more. In essence, Continental and the Chamber contend that the consequences of Continental's actions or inaction must have been not only substantially certain to result but also the end purposely sought. Thus, to avoid the cap, according to Continental and the Chamber, the property owners must demonstrate that Continental continued to operate its leaky facility *in order to* pollute the property owners' properties rather than, for example, to make or save money.

At trial, Continental failed to object to the relevant jury instruction and later failed to raise this same argument in its

post-trial motion. Indeed, Continental's brief in support of its post-trial motion unequivocally adopted the district court's definition after noting Georgia's reliance on the Restatement. [Br. in Supp. of Defs.' Post-Trial Mot. at 20]. Not only has Continental failed to acknowledge its lack of objection to the jury instructions, but it has also failed to argue for the application of one of the exceptions to our rule regarding a party's waiver of an issue raised for the first time on appeal. *See, e.g., Access Now, Inc.*, 385 F.3d at 1331-35; *see also supra* note 8. Moreover, in its brief on appeal, Continental neither expressly challenges the district court's jury instruction nor requests a review of the instruction for plain error. *See* Fed. R. Civ. P. 51(c) & (d). Consequently, Continental has waived this argument.[10]

We therefore decline to consider whether Continental's proffered definition of "specific intent," to the extent it diverges from the definition provided by the district court, is correct. Instead, we review the evidence in the record to determine whether it allows for an inference that Continental at least believed that the contamination was "substantially cer-

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[10] We disagree with Continental's contention that we must entertain its argument anyway and find that the cases upon which Continental relies have no bearing in this case. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-14, 108 S. Ct. 2510, 2519-20 (1988) (concluding only that it was not impermissible for the Fourth Circuit Court of Appeals to issue a ruling based on a legal standard different from the standard provided in the district court's jury instructions); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120, 108 S. Ct. 915, 922 (1988) (holding that the defendant's failure to object to a jury instruction would not foreclose review of the relevant legal issue raised on appeal when the defendant's "legal position in the District Court . . . was consistent with the legal standard it" advocated on appeal, and the Court of Appeals had "very clearly considered, and decided," the issue on appeal).

tain" to result from its actions or inaction. We conclude that the evidence was sufficient to support such a finding.[11]

2. *Sufficiency of the Evidence*

The evidence at trial demonstrated that by the late 1990s, if not sooner, Continental was aware that Unit 1 had fallen into a state of disrepair, a condition Nicks, the Phenix City plant manager from 1999 to 2004, agreed was "deplorable." [Trial Tr. at 389]. In 1998, Ken Wilder, at the time the Phenix City plant manager, along with Todd Miller, then CCC's Corporate Director of Safety, Health, and Environmental Affairs, attended a citizens meeting at the Columbus City Manager's office. [Pls.' Ex. 2]. According to Wilder's notes, which he submitted in a memorandum to Nicks, the purpose of the meeting was to discuss complaints of pollution that the citizens apparently believed was carbon black. The citizens provided detailed descriptions of the fallout on their property, and Ditchfield discussed problems he had been having since 1982. Notably, Wilder's memorandum acknowledged that "[i]n 1982 the plant had a problem resulting in carbon black on residents[' homes] in the Oakland Park area. Continental Carbon paid to have the homes of residents cleaned." [Pls.' Ex. 2-1]. Nevertheless, pointing to chemical analyses conducted by McCrone Associates, Inc., and referring to the "elemental composition" of the samples tested, Wilder assured the attendees that the pollution was not carbon black despite knowing that at least one of McCrone's previous analyses suggested that it was.[12]

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[11] Continental similarly waived its current arguments that it lacked notice of the possibility that the district court would interpret the specific intent requirement as it did and that the Rule of Lenity compels an alternate interpretation.

[12] Approximately one year before the meeting with the Columbus citizens, CCC had submitted a sample of dark material from Action Marine to McCrone for an analysis. McCrone shared the results with Gary Shafer, then the Phenix City plant's Director of

Apparently dissatisfied with Continental's explanation, the complaints continued, and Nicks, after becoming plant manager, grew increasingly disgusted with the condition of the facility. Around that same time, two separate teams of CCC employees, one of which included Nicks, evaluated Unit 1 and recommended destructing and rebuilding the system almost entirely. CSRC then sent a team of its own, which arrived at a different conclusion and recommended not rebuilding Unit 1.[13] Continental scrapped the project and did not resume meaningful efforts to resuscitate the rebuilding plan until 2004. Even then, internal company E-mails re-

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Safety, Health, and Environmental Affairs. According to McCrone's report, the carbon black reference sample provided by CCC contained primarily carbon and a trace of sulfur. The Action Marine sample contained, *inter alia*, carbon and sulfur, which McCrone somewhat dismissively concluded "may indicate a trace of your carbon black." [Pls.' Ex. 80-1].

At trial, Nicks testified regarding this analysis and described McCrone as an "independent laboratory." [Trial Tr. at 287]. The jury was free to conclude otherwise. In a facsimile transmission to Tharpe informing him of the test results, McCrone described the elemental composition of the sample, including the existence of carbon and sulfur. Despite having already conveyed to CCC the possibility that the sample contained carbon black, McCrone's note to Tharpe concluded, "Therefore, although the black particulate on the wipe looks like the carbon black both visually and with the microscope, *the elemental data show the two to be different.*" [Pls.' Ex. 80-2] (emphasis added). At trial, Nicks acknowledged that the information provided by McCrone to Tharpe was inconsistent with the information McCrone provided to CCC and agreed that one possible explanation was that McCrone had lied for CCC. [Trial Tr. at 292].

[13] Continental anticipated that rebuilding Unit 1 would cost in excess of $4 million. All expenditures exceeding $200,000 required the approval of CSRC president Peter Wu, Ph.D., who also served as CCC's chief executive officer and vice-chairman of its board.

vealed, Continental planned to extend completion of the project to at least 2006.

In 1999, Continental constructed Unit 2 and installed the thermal oxidizer. When developing plans for Unit 2, Continental made an economic decision to limit the number of bagfilter compartments, thereby rendering Unit 2 incapable of sustaining the flow of air needed to maintain acceptable production levels. Rather than reduce production, however, Continental overloaded Unit 2, and the bagfilters, which the manufacturer designed to last one year, began splitting and leaking in half that time. Indeed, some evidence suggested that the bagfilters failed after only three or four months.

Emissions and complaints continued despite the operation of the thermal oxidizer, the supposed catchall. In April 2001, in response to complaints from Tharpe, an investigator with the U.S. Environmental Protection Agency sat across the river from the Phenix City plant and documented a carbon black emission from two exhaust stacks that CCC had not even received a permit to operate. Nicks later became aware that samples taken from Action Marine following the emission tested positive for carbon black. Approximately six months later, with no steps having been taken to correct the problems with Unit 2, Nicks sent an e-mail, copied to Juan D. Rodriguez, at the time CCC's senior vice-president of operations, describing Unit 2 as "constantly operating with some small leak up to a[n] intolerable leak." [Pls.' Ex. 5]. Nevertheless, Continental did not finally approve the addition of two bagfilter compartments until July 2002, approximately ten months later.

Continental's attitude regarding carbon black emissions was further evidenced by its failure to attempt to accurately monitor the carbon black being released into the environment. Nicks testified that he had no means of determining how much carbon black his facility released into the air. According to Nicks, the plant relied solely on employees' visual observation to determine whether any black smoke drifted

from the facility. Nobody was assigned to monitor the emissions on a full-time basis, however, and testimony confirmed that visually monitoring black emissions at night from the plant was virtually impossible.

The plant did utilize an alarm system designed to detect solid and liquid particles in the exhaust plumes; however, according to Randy Wangle, a former maintenance superintendent at the Phenix City plant, Continental had a policy of simply cleaning and resetting the alarm without addressing leaks unless the alarm sounded several times within an hour.

We have closely reviewed the massive record in this case, and, as the foregoing discussion demonstrates, we conclude that the evidence, which was clear and convincing, was more than sufficient to demonstrate that Continental operated the Phenix City plant and failed to correct the problems plaguing it with the "specific intent to cause harm" to the property owners, as that term is defined by the jury instructions which govern this case.[14]

C. *Compensatory Damages*

1. *The Proper Measure of Action Marine's Damages*

The purpose of compensatory damages is "to place an injured party in the same position as it would have been in had there been no injury . . ., that is, to compensate for the injury actually sustained." *Home Ins. Co. v. N. River Ins. Co.*,

[14] The cases upon which Continental primarily relies do not compel a different outcome. *See Wal-Mart Stores, Inc. v. Johnson*, 547 S.E.2d 320, 322-25 (Ga. Ct. App. 2001) (concluding that the evidence was sufficient to find that the defendant, Wal-Mart, acted with specific intent to harm the plaintiff despite evidence that would allow a fact finder to conclude that the plaintiff was the victim of poor communication and confusing circumstances); *Bentley*, 427 S.E.2d at 505 (finding that the cap applied in a case involving injuries caused by an exhausted truck driver); *Viau*, 418 S.E.2d at 608 (finding that the cap applied in a case involving injuries caused by an intoxicated driver).

385 S.E.2d 736, 742 (Ga. Ct. App. 1989). Continental contends that the damages awarded to Action Marine improperly include a windfall of approximately $800,000 in debt incurred in the ordinary course of business. This argument does not take into account the evidence that Continental's actions led to Action Marine's demise and thus its inability to generate revenue and repay its debts.[15] Although the parties fail to cite relevant Georgia law, the Georgia Supreme Court rejected an argument similar to Continental's in circumstances sufficiently similar to the instant case for this court to do the same. *See Bennett v. Smith*, 267 S.E.2d 19, 19-20 (Ga. 1980).[16]

Without objection from Continental, at trial Action Marine presented as an expert Edward Sauls, who was at the time a certified public accountant, certified valuation analyst with an accreditation in business valuation, and a certified financial forensic analyst. In great detail, Sauls explained to the jury the basis for his conclusion that an award of $1.2 million was necessary to "place [Action Marine and its owner, Tharpe] in the position financially that they otherwise

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[15] Continental does not challenge the sufficiency of the evidence linking its carbon black to Action Marine's closing beyond what has already been discussed. Therefore, we assume without deciding that Action Marine proved that the discoloration of its boats proximately caused its insolvency.

[16] Not entirely analogous, *Bennett* is nonetheless instructive. The plaintiffs in *Bennett* operated an egg farm and contended that the defendants had sold them contaminated feed, which "caused the plaintiffs' hens to stop laying eggs." *Id.* at 19. After distinguishing the case from more typical breach of contract cases involving incomplete transactions, the Georgia Supreme Court concluded that the plaintiffs could recover "lost revenues as damages *without deducting production expenses therefrom*, since the plaintiffs' evidence showed that they incurred the same expenses they would have incurred had the hens continued to lay eggs." *Id.* at 20 (emphasis added).

would have been had it not been for the actions of the Defendant." [Trial Tr. at 1097]. In other words, he testified as to "what . . . Action Marine [would] be worth today had they not lost . . . profits." [Trial Tr. at 1110].

He further explained the three common "approaches to valuation" and led the jury through his application of the "asset-based" approach. Essentially, based on what Sauls concluded Action Marine would be worth but for Continental's conduct, he determined that a purchaser as of the trial date would assume Action Marine's liabilities of $795,243 and pay an additional $653,166 for a total of $1,448,409. He further reduced the total to account for variables that are not important here and concluded that $1.2 million would be necessary to compensate Action Marine for the pollution damage. [Trial Tr. at 1117-18].

On cross-examination, Continental did not challenge Sauls's valuations and focused solely on the basis for his conclusion that Action Marine's losses were attributable to the carbon black contamination. Moreover, Continental neither offered an alternative methodology nor presented an expert of its own to provide a different quantum of damages. Continental now contends that Sauls's application of the asset-based approach was incorrect. We disagree. *See Dunn v. Comm'r of Internal Revenue*, 301 F.3d 339, 352-53 (5th Cir. 2002) (approaching asset-based valuation from the perspective of a "willing buyer"); *Okerlund v. United States*, 53 Fed. Cl. 341, 347 n.4 (Fed. Cl. 2002) ("Under the asset based approach, the value of a business is equal to the cost that would be incurred in acquiring a group of assets of similar utility"). Even if Sauls was mistaken in his calculations, Continental had every opportunity to highlight his error for the jury.

We conclude that the district court did not err in denying Continental's motion for remittitur or a new trial on damages. Action Marine's proffered measure of damages did not impermissibly include damages not attributable to Continen-

tal's carbon black, and the expert testimony was sufficient to support the compensatory damages awarded.

2. *Tharpe's Ability to Recover Damages*

Continental contends that Tharpe may not recover damages because his injuries, as sole shareholder of Action Marine, are derivative of his company's injuries. Again, we disagree. In Georgia, a sole shareholder's status as personal guarantor of his corporation's debt gives rise to an independent, legally compensable injury when tortious acts directed at the corporation injure the shareholder in that capacity. *William Goldberg & Co., Inc. v. Cohen*, 466 S.E.2d 872, 881-82 (Ga. Ct. App. 1995). Continental offers no reason to believe that a similar rationale would not apply with respect to the independent injuries inflicted upon Tharpe's business reputation, which was so intertwined with that of his corporation as to be virtually inseparable. *See* O.C.G.A. § 41-1-1 (1997) ("A nuisance is anything that causes hurt, inconvenience, or damage to another . . . ."); *Anderson v. Fussell*, 44 S.E.2d 694, 696 (Ga. Ct. App. 1947) ("The body, reputation, and property of the citizens are not to be invaded without responsibility in damages to the sufferer."); *cf. Curl v. First Fed. Sav. & Loan Ass'n of Gainesville*, 257 S.E.2d 264, 265-66 (Ga. 1979) (upholding a jury verdict in favor of a plaintiff in a wrongful foreclosure suit seeking damages for, *inter alia*, injury to her reputation in the community). Therefore, we conclude that the district court did not err in allowing Tharpe's claims to go to the jury.

D. *Constitutionality of the Punitive Damages Award*

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *B.M.W. of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1595 (1996).[17] "It should be

[17] Georgia law allows punitive damage awards in cases involving "aggravating circumstances in order to penalize, punish, or deter a defendant." O.C.G.A. § 51-12-5.1(a) (2000).

presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003).

The United States "Constitution imposes a substantive limit on the size of punitive damages awards[,]" however. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420, 114 S. Ct. 2331, 2335 (1994). "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Id.* at 434-35, 114 S. Ct. at 2342. We are therefore charged with reviewing the jury's award to determine whether it "can fairly be categorized as 'grossly excessive' in relation to" the state's legitimate interests, *Gore*, 517 U.S. at 568, 116 S. Ct. at 1595, and to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426, 123 S. Ct. at 1524.

When determining whether a punitive damages award is unconstitutionally excessive, we are guided by "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[18] *Id.* at 418, 123 S. Ct. at 1520. We do not view these "guideposts" as an "analytical straitjacket," *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 81 (1st Cir. 2001),

[18] Defendants do not challenge the amount of the punitive damages award as excessive under Georgia law other than as already discussed.

and we maintain as our overarching aim eliminating the risk that a defendant is punished arbitrarily or without fair notice of the possible consequences of its actions. *Gore*, 517 U.S. at 574, 116 S. Ct. at 1598 (noting that due process requires a person to have "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

1. *Reprehensibility*

Of the three guideposts, the reprehensibility of a defendant's conduct is the most relevant; punitive "damages imposed on a defendant should reflect 'the enormity of his offense.'" *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. In evaluating reprehensibility, we consider

> whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

Campbell, 538 U.S. at 419, 123 S. Ct. at 1521 (citations omitted).

The reprehensibility determination "must begin with the identification of the state's interest and an assessment of the strength of that interest," which are questions of law. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999). We assume from the parties' arguments that

the relevant interest served in this case is Georgia's "strong interest in deterring environmental pollution." *Id.* at 1335.[19]

We note that the district court found that the evidence had "established a pattern of intentional misconduct . . . leading to repeated damage to Plaintiffs' properties." The district court also described Continental's approach to dealing with the public and the property owners as "less than honest."

In addition, the district court referred to evidence regarding the potential health hazards associated with inhalation or ingestion of carbon black, including a finding documented in Continental's Material Safety Data Sheet that carbon black is a possible cause of cancer in humans. The district court, therefore, did not clearly err when concluding that Continental's actions reflected an indifference to or a reckless disregard of the health or safety of others.[20]

We conclude that the district court's findings are supported by the record, and we agree with the district court that these facts support a finding that Continental's actions were "so reprehensible as to warrant the imposition of further sanctions." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521. We go further, however, to note briefly those aspects of the facts in this case that justify the punitive damages actually awarded.

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[19] Although *Johansen* concerned water pollution, our rationale (i.e. Georgia's legislative enactments addressing pollution) applies equally in this case. *See* O.C.G.A. § 12-9-23 (2006) (establishing civil penalty of up to $25,000 per day for violations of the Georgia Air Quality Act, §§ 12-9-1 to 12-9-25).

[20] The evidence does not conclusively establish that carbon black is carcinogenic in humans. Continental suggests that lack of certainty renders its conduct less reprehensible. On the contrary, the risk of releasing a possible carcinogen into the environment, even when, or perhaps especially when, the possibility is not well defined, counsels for the adoption of extraordinary precautions and justifies extraordinary penalties when available precautions are consciously ignored.

With respect to the pattern and duration of Continental's intentional misconduct, the events at issue spanned more than five years, and Continental continued its course of action and inaction undeterred by both the prospect and reality of litigation. In addition, the harm inflicted cannot adequately be characterized as solely economic. Continental's actions resulted in the destruction of a once successful business and interfered with the use and enjoyment of municipal property. Moreover, according to the evidence, the City, which is accountable to all of its citizens, was compelled to approve special funding for and devote extraordinary labor resources to the cleaning of its damaged properties.

The evidence also demonstrated Continental's willingness to elude accountability. An employee of the Alabama Department of Environmental Management ("ADEM") apparently offered the Phenix City plant management advanced warning of impending, supposedly surprise, government inspections. Furthermore, the properties at issue are located in a state whose government could offer the property owners no regulatory protection. Indeed, Nicks testified that when representatives from the Georgia Department of Natural Resources surprised him with an unannounced visit to inspect the plant, he denied them entry.

Finally, we note that Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation. While punitive damages may not be awarded to punish for harm inflicted on nonparties, we may consider the risk of harm to others as part of the reprehensibility analysis. *Philip Morris U.S.A. v. Williams*, 549 U.S. ___, 127 S. Ct. 1057, 1063-64 (2007).

We conclude, therefore, that Continental's actions and inaction were exceedingly reprehensible.[21] We decline Con-

[21] The fact that Alabama permitted CCC to release carbon black into the atmosphere is of no consequence and, in any case, does not negate the reprehensibility of Continental's actions. As Conti-

tinental's invitation to compare its actions with those of other defendants in dissimilar contexts and base our conclusion on the facts before us in this case alone. *Cf. TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458, 113 S. Ct. 2711, 2720 (1993) (plurality) ("[W]hile we do not rule out *the possibility* that the fact that an award is significantly larger than those in *similar circumstances might*, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards." (emphasis added)). A substantial penalty beyond the compensatory damages awarded was fully warranted. *See In re Exxon Valdez*, 472 F.3d 600, 625 (9th Cir. 2006) (reducing punitive damages award to $2.5 billion despite actual damages, including those paid to settle numerous claims, of $504.1 million); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding a punitive damages award of $13.3 million imposed on the board of trustees for a public library system and the board's director despite a compensatory damages award exceeding $3 million when the defendants' wrongful actions were intentional and evidenced efforts to cover up their wrongful intent); *cf. Johansen*, 170 F.3d at 1339 (upholding a punitive damages award of $4.35 million, which represented nearly 100 times the compensatory award, in a pollution case involving conduct deemed "not very reprehensible, with no aggravating factors present"), *cert. denied sub nom. Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931, 120 S. Ct. 329 (1999).

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nental acknowledged at trial, its permit did not empower the company to damage property. Further, the Supreme Court has noted that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious." *Campbell*, 538 U.S. at 422, 123 S. Ct. at 1522.

2. The Difference Between Actual or Likely Damages and the Punitive Damages Award

We next ask "'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *TXO Prod. Corp.*, 509 U.S. at 460, 113 S. Ct. at 2721 (quoting with added emphasis *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045 (1991)), *quoted in Gore*, 517 U.S. at 581, 116 S. Ct. at 1602. This determination has not yet been reduced to a "simple mathematical formula." *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602. Instead, the Supreme Court has endorsed the view that "ratios greater than those [the Court has] previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524 (quoting *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602). Conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based on the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Continental contends that a punitive to compensatory damage ratio of 9:1 is unconstitutional in light of the substantial compensatory award and the Supreme Court's relevant directives. We need not address this question directly, however, because the relevant ratio is actually 5:1.

In Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature. *See* O.C.G.A. § 13-6-11 (2006 Supp.);[22] *City of Warner Robins v. Holt*, 470

[22] When first adopted, the statute referred specifically to "bad faith in making [a] contract" and was codified in the section of the Georgia Code governing contracts. O.C.G.A. § 13-6-11 (1982). In 1984, the statute was amended to remove the language limiting its

S.E.2d 238, 240 (Ga. Ct. App. 1996) (holding that the purpose of an award of attorney fees and litigation expenses "is to compensate an injured party, in order that such parties are not further injured by the cost incurred as a result of the necessity of seeking legal redress for their legitimate grievances"); *Ross v. Hagler*, 433 S.E.2d 124, 127 (Ga. Ct. App. 1993) (noting that an award of attorney fees under section 13-6-11 is not punitive in nature); *Privitera v. Addison*, 378 S.E.2d 312, 317 (Ga. Ct. App. 1989) (describing fees awardable under section 13-6-11 as an element of "actual damages"). The attorney fees in this case were premised on a finding of bad faith pursuant to section 13-6-11. Consequently, we include the attorney fees as part of the measure of actual damages for the necessary comparison. *See Willow Inn, Inc. v. Pub. Svc. Mut. Ins. Co.*, 399 F.3d 224, 234-37 (3d Cir. 2005) (relying on state law to define the character of an attorney fee award and including the fee award in its calculation of actual damages).[23]

The question we must ask then is whether a punitive damages award of $17.5 million is proportionally related to the compensatory damage award of approximately $3.2 million. Under the circumstances of this case, we think it is.

We have not overlooked the Supreme Court's guidance, described by the Court as "not binding" but "instructive," *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524, that ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process

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applicability to contract cases, and it has since been applied in cases involving tort claims. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Clark*, 566 S.E.2d 2, 11 (Ga. Ct. App. 2002).

[23] The district court's reliance on the 9:1 ratio constitutes a legal determination involving the definition of compensatory damages, which we review *de novo*. Thus, we do not mean to suggest that the district court's calculations were factually clearly erroneous.

requirements.[24] The facts before us, we believe, compel application of what the Court may someday unequivocally endorse as the rare exception. *See In re Exxon Valdez*, 472 F.3d at 624 (concluding that a ratio of approximately 5:1 ($2.5 billion:$504 million) was constitutionally sound despite finding that the conduct at issue was neither intentional nor malicious and that previous efforts to correct the damage mitigated reprehensibility); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005) (developing, based on the relevant Supreme Court precedents, a general guideline allowing for a single-digit ratio greater than 4:1 in cases involving "significant economic damages and more egregious behavior"), *cert. denied*, 126 S. Ct. 1912 (2006). As we have already concluded, the evidence supporting the district court's finding of reprehensibility alone justifies the punitive damages award.[25]

3. *Comparable Civil and Criminal Penalties for Similar Conduct*

Lastly, we must consider "the available civil and criminal penalties the state provides for" Continental's misconduct

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[24] *See Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524 (endorsing a 1:1 ratio as the general rule when substantial compensatory damages have been awarded and noting the Court's historical view that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety"). *But see TXO Prod. Corp.*, 509 U.S. at 462, 113 S. Ct. at 2722 (upholding a punitive damages award in excess of 526 times the actual damages awarded); *Haslip*, 499 U.S. at 23, 111 S. Ct. at 1046 (upholding a punitive damages award "more than 4 times the amount of compensatory damages, . . . more than 200 times the out-of-pocket expenses of [the plaintiff], . . . and . . . much in excess of the fine that could be imposed for insurance fraud").

[25] We reach this conclusion without considering the likely harm that would have resulted had Continental been permitted to continue polluting the property owners' property. Obviously, this factor would only strengthen our conclusion.

to determine whether Continental had notice that it could be ordered to pay the amount awarded. *Johansen*, 170 F.3d at 1337. "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Gore*, 517 U.S. at 583, 116 S. Ct. at 1603 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S. Ct. 2909, 2934 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part)). This factor, however, "is accorded less weight in the reasonableness analysis than the first two guideposts." *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004).

We must first decide whether to look to the law of Georgia, which has the greater interest in deterring Continental's conduct in this case, or the law of Alabama, which has regulatory authority over Continental. We assume from the parties' arguments that Alabama law is the appropriate guide.

Relying on provisions in the Alabama Environmental Management Act ("AEMA"), Continental contends that the potential penalty in Alabama could not exceed $250,000 and therefore could not provide notice of a potential civil penalty of $17.5 million. *See* Ala. Code § 22-22A-5(18)(c) (2006 Repl. Vol.). While it is true that the relevant provision of the AEMA limits "the total penalty assessed in *an* order issued" (emphasis added) by the regulating agency, the statute does not limit the number of such orders the agency may issue. *Id.* In other words, ADEM is empowered to assess a penalty of up to $25,000 per violation up to a total of $250,000 per order. *Id.* That does not mean that after issuing such an order, ADEM cannot again assess penalties against a polluter who was the subject of a $250,000 fine. To so interpret the statute would lead to absurd results and defeat the Act's stated intent "to improve the ability of the state to respond in an efficient, comprehensive and coordinated manner to environmental

problems, and thereby assure for all citizens of the state a safe, healthful and productive environment." § 22-22A-2.[26]

Conceivably, then, Alabama could fine Continental $250,000 for every ten violations. As we stated in *Johansen*, however, "[i]f a statute provides for a range of penalties depending on the severity of the violation, . . . it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute." 170 F.3d at 1337. Thus, we cannot simply presume that Alabama would have fined Continental an incalculable number of times or would have assessed the maximum amount each time. Nor are we capable of guessing as to the frequency of Continental's violations, though evidence in the record indicates that it did indeed violate conditions of its permit and thus the AEMA. *See generally* § 22-22A-5(18).

We do not find ourselves utterly without guidance, however, for "the extent of the defendant's statutory notice is related to the degree of reprehensibility of his conduct." 170 F.3d at 1337. Considering the reprehensibility of Continental's conduct, we can surmise that if Alabama citizens had found themselves the victims of Continental's malfeasance, ADEM would have vigorously enforced the relevant statutes and fined Continental closer to the maximum amount allowed, perhaps several times if necessary. Continental consequently was on notice that its actions could result in civil penalties that far exceed the per-order cap limiting ADEM's discretion, and we do not believe it implausible that vigorous enforcement would have led to an accrual of fines totaling several million dollars. We are thus satisfied that the award

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[26] We do not intend to suggest that the penalties assessable pursuant to the AEMA provide the "most relevant 'other sanction.'" *Johansen*, 170 F.3d at 1337. Continental focuses solely on the AEMA, as did the district court, apparently. The property owners offer no alternative.

was not grossly disproportionate to the penalties Continental faced for its actions. Moreover, we conclude that the punitive damages award was not unconstitutionally excessive.

V. CONCLUSION

In sum, the evidence and the relevant law supported the jury's verdict, the final judgment, and the district court's decision to deny Continental's post-trial motion. Accordingly, we affirm the district court's order and the judgment entered on the jury's verdict.

AFFIRMED.

APPENDIX B

United States District Court, M.D. Alabama,
Eastern Division.
ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTAL CARBON, INC., et al., Defendants.
No. 3:01-CV-994-MEF

Jan. 23, 2006

MEMORANDUM OPINION AND ORDER

FULLER, Chief J.

This cause is before the Court on the Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 248) filed on February 14, 2005. The Court has carefully considered the Brief in Support of Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 281) filed on April 20, 2005 and the Plaintiffs' Opposition to Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 290) filed on May 20, 2005. For the reasons set forth in this Memorandum Opinion and Order, the Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 248) is due to be DENIED.

BACKGROUND

On August 13, 2001, Action Marine, Inc. (hereinafter "Action Marine") a Georgia business, and its owner John Tharpe (hereinafter "Tharpe") filed suit in this Court[1] against Continental Carbon Incorporated (hereinafter "Continental

[1] Action Marine invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1332.

Carbon"), Barry Nicks[2] (hereinafter "Nicks"), Todd Miller (hereinafter "Miller"),[3] China Synthetic Rubber Corporation ("China Synthetic"), and Taiwan Cement Corporation (hereinafter "Taiwan Cement")[4] (hereinafter collectively referred to as "Defendants"). Action Marine's original complaint included the following claims: Negligence (Count I); Wanton Conduct (Count II), Breach of Duty to Warn (Count III); Fraud, Misrepresentation, and Deceit (Count IV); Nuisance (Count V); Trespass (Count VI); Common Law Strict Liability (Count VII); and Permanent Injunction (Count VIII). Although, the Complaint stated that Action Marine brought this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court later denied Plaintiffs' request for class certification.

On January 22, 2002, Action Marine filed an Amended Complaint (Doc. # 28). By this amendment, Action Marine added two additional named plaintiffs: the City of Columbus, Georgia (hereinafter "City of Columbus") and Phillips Homes, Inc. (hereinafter "Phillips Homes"), a Georgia business. On February 14, 2002, Plaintiffs again amended their allegations by filing the Second Amended Complaint (Doc. # 34). The Second Amended Complaint added Owen Ditchfield (hereinafter "Ditchfield"), a citizen of Georgia as a named plaintiff to the action.

Defendants filed dispositive motions which were granted in part and denied in part. Plaintiffs abandoned some of their claims. On August 11, 2004, the trial of this cause began. Plaintiffs presented the following claims to the jury: nuisance, trespass, negligence, and wantonness. All parties

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[2] Nicks is incorrectly denominated in the Second Amended Complaint as Nix.

[3] Action Marine alleged that Nicks and Miller were employees of Continental Carbon's Phenix City plant.

[4] China Synthetic and Taiwan Cement are the parent corporations of Continental Carbon.

agreed that the substantive law of Georgia applied to this case. The presentation of evidence and witnesses lasted for ten days. During this time, the jury heard testimony from both fact witnesses and expert witnesses. Some of that testimony was conflicting and necessarily required the jury to make credibility determinations. Defendants made a motion for judgment as a matter of law at the close of the Plaintiffs' case on the seventh day of the trial. The Court granted this motion in part and denied it in part. Defendants presented evidence in opposition to Plaintiffs' claims including its own fact witnesses and expert witnesses. Defendants renewed their motion for judgment as a matter of law at the close of their case in chief. The Court denied the renewed motion for judgment as a matter of law.

The Court asked the parties to submit proposed jury instructions and proposed verdict forms. The Court conducted a charge conference where the jury instruction and verdict forms were discussed with counsel. On the ninth day of trial, the Court instructed the jury and they began their deliberations. The jury submitted several questions to the Court during their deliberations and the Court addressed all such questions after conferring with counsel.

On the tenth day of trial, the jury returned a verdict for Plaintiffs. In returning this verdict in favor of the Plaintiffs, the jury completed a nine page Verdict Form (Doc. # 216) and answered twenty special interrogatories. The jury awarded $1.2 million dollars in compensatory damages to Action Marine; $100,000 in compensatory damages to John Tharpe; $45,000 to Owen Ditchfield; and $570,000 to the City of Columbus, Georgia. After the verdict, Defendants orally renewed their motion for judgment as a matter of law. The Court denied the renewed motion for judgment as a matter of law.

After the return of the verdict on liability and compensatory damages, additional testimony was presented in support of Plaintiffs' claims for punitive damages and attorneys' fees.

The Court provided the jury with further jury instructions and a verdict form addressing the punitive damages and attorneys' fees issues. The jury returned a verdict in Plaintiffs' favor. In returning this supplemental verdict on attorneys' fees and punitive damages, the jury competed [sic] a Supplemental Verdict Form (Doc. # 217) which required them to answer three specific interrogatories. The jury awarded Plaintiffs $17,500,000 in punitive damages and $1,294,000 in attorneys' fees[5] and specifically found that Defendants acted or failed to act with a specific intent to harm the Plaintiffs.

At the conclusion of the jury trial in this case, there still remained pending before this Court Plaintiffs' claims for injunctive relief. This Court required further submissions on the issue of injunctive relief. Persuaded that injunctive relief was appropriate, but concerned that prior submissions failed to provide sufficient information to allow the Court to shape the injunctive relief, the Court required additional submissions on the injunctive relief. The parties negotiated a settlement of the injunctive claims and submitted a proposed order setting forth the injunctive relief to which they had agreed. In early July of 2005, this Court entered an injunction.

In addition to the post judgment motions now pending before this Court [sic]. The parties have been litigating some post judgment claims regarding sanctions against Defendants for conduct during pretrial discovery which was not discovered until after the conclusion of the trial. This Memorandum Opinion and Order will not touch on those sanctions because that matter has been referred to Magistrate Judge McPherson who, consistent with the practice of this district, is more intimately familiar with the course of discovery in this litigation and the patterns of the parties' conduct during discovery.

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[5] Attorneys' fees were awarded pursuant to O.C.G.A. § 13-6-11, and punitive damages were awarded pursuant to O.C.G.A. § 51-12-5.1.

DISCUSSION

A. Motion for Judgment as a Matter of Law

A motion for judgment as a matter of law as to a particular issue should be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-movant] on that issue." Fed. R. Civ. P. 50(a)(1); *Wood v. Green*, 323 F.3d 1309, 1312 (11th Cir. 2003). Thus, as the Eleventh Circuit has explained,

> [t]he jury's verdict must stand unless there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. It is the jury's task–not ours–to weigh conflicting evidence and inferences, and determine the credibility of the witnesses. If reasonable jurors could reach different results, we must not second guess the jury or substitute our judgment for its judgment.

Shannon v. Bellsouth Telecomms., Inc., 292 F.3d 712, 715 (11th Cir. 2002) (internal quotations and citations omitted.)

Defendants raise several arguments in support for their motion for judgment as a matter of law relating to the sufficiency of the evidence on various issues. This Court is not convinced by any of these arguments. The jury attentively listened to the witnesses and had an ample opportunity to review the exhibits during their deliberations and when they were published at trial. Moreover, the jury was carefully instructed on all of the applicable law and provided with a very specific verdict form. This Court is persuaded that there exists a legally sufficient evidentiary basis in support of every aspect of the jury's verdict challenged by Defendants in their current motion for judgment as a matter of law. Accordingly, to the extent that Defendants argue that they are entitled to judgment as a matter of law, their motion (Doc. # 248) is due to be DENIED.

B. Motion for a New Trial

Pursuant to Federal Rule of Civil Procedure 59(a)(1), a motion for a new trial may be granted as to all or any of the parties and on all or part of the issues tried to a jury "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." In support of their alternative motion for a new trial, Defendants contend that the verdict rendered by the jury after this ten day trial is against the great weight of the evidence. The Court does not agree. To the extent that Defendants have argued that they are entitled to a new trial because any aspect of the jury's findings was against the great weight of the evidence or unsupported by the evidence, their motion for a new trial on those bases are due to be DENIED.

Defendants contend that they are entitled to a new trial due to purported errors within the jury charges, the verdict form, rulings on the admissibility of evidence, and a ruling requiring a witness to be produced at trial. (Doc. # 248 at 22-25) The Court has considered each and every one of these grounds and find them to be wholly without merit. Accordingly the motion for new trial is due to be DENIED to the extent that it is predicated on these grounds.

Defendants contend that the compensatory damages in this case are not supported by evidence. Defendants also contend that damages awarded to Action Marine are legally improper. (Doc. # 248 at 27). On these contention, they seek either a new trial or remittitur. The Court does not agree that the compensatory damage awards are legally flawed as Defendants contend. Accordingly, the alternative motions for new trial or remittitur on such arguments are due to be DENIED.

Defendants argue that the size of the punitive damage award and the "inflammatory rhetoric of Plaintiffs' counsel" compel the conclusion that the verdict in the second phase of the trial was the produce [sic] of passion and prejudice.

Based on this argument Defendants seek a new trial on punitive damages. The Court is not persuaded that Defendants are entitled to a new trial based on this argument. The punitive damage award is not grossly disproportionate to the compensatory damages award. Moreover, the Court does not agree with the Defendants' characterization of Plaintiffs' counsels' rhetoric in this case. The motion for a new trial on punitive damages is due to be DENIED.

C. Motions Relating to Punitive Damage Awards

Defendants contend that the punitive damages awarded by the jury in this case are improper and excessive. They ask this Court either to grant judgment as a matter of law on punitive damages, or to order a new trial on punitive liability, or to remit the punitive damages awarded. Defendants argue that their conduct does not satisfy the standard for the award of punitive damages under Georgia law, that the award should be reduced pursuant to § 51-12-5.1(g) of the Georgia Code, and that the punitive damages awarded were excessive under both Georgia law and the United States Constitution. The Court will address each of these arguments in turn.

1. Georgia's Standard for the Imposition of Punitive Damages

Section 51-12-5.1 of the Georgia Code controls punitive damages in tort actions under Georgia law. Punitive damages under this statute are intended solely to punish, penalize, or deter a defendant. Pursuant to O.C.G.A. § 51-12-5.1, punitive damages may only be awarded in tort actions in which it is proven by clear and convincing evidence that the defendant's conduct showed willful misconduct, malice, fraud, wantonness, oppression, or an entire want of care which would raise the presumption of conscious indifference to consequences. Defendants contend that they are entitled to judgment as a matter of law or a new trial on punitive liability because the standard for the imposition of punitive damages was not met in this case. The Court disagrees. The jury was correctly in-

structed on the applicable law and heard sufficient evidence on which to base the award of punitive damages under Georgia law. Accordingly, Defendants are not entitled to judgment as a matter of law in Defendants' favor on Plaintiffs' claims for punitive damages. Moreover, Defendants are not entitled to a new trial because the Court is not persuaded that the jury's finding of punitive liability is against the weight of the evidence. Defendants' motions are due to be DENIED to the extent that they are based on these grounds.

2. Georgia Code § 51-12-5.1(g)

Under Georgia law, the maximum amount of money that a jury may award to any one plaintiff as punitive damages is limited to $250,000. *See* O.C.G.A. § 51-12-5.1(f) & (g). Georgia law does provide that punitive damages awards may exceed this cap if "it is found that the defendant acted, or failed to act, with the specific intent to cause harm." *Id.* If a jury finds that a defendant acted or failed to act with specific intent to cause harm, "there shall be no limitation regarding the amount which may be awarded as punitive damages...." O.C.G.A. § 51-12-5.1(f). The Court finds that the jury in this case was properly instructed on the imposition of punitive damages and that they answered a specific interrogatory which affirming that they had found the specific intent to cause harm which under Georgia law presents a basis for sustaining a damage award in excess of the statutory cap. The Court does not agree that Plaintiffs failed to adduce sufficient evidence that Defendants acted with specific intent to harm Plaintiffs. The Court is not persuaded that the jury's factual determination of specific intent should be disturbed. Accordingly, the motion is due to be DENIED to the extent that Defendants contend that the punitive damage award should have been capped pursuant to Georgia law.

3. Analysis of Amount of Punitive Damages Under Georgia Law

Defendants contend that the punitive damage award is excessive and must be either vacated or remitted under Georgia law.

> In determining the reasonableness of an award of punitive damages [under Georgia law], courts should consider whether: (1) the misconduct caused personal injury or merely damage to property; (2) the actor's misconduct was active or passive; and (3) a rational relationship exists between the misconduct and the amount of the award.

Lightning v. Roadway Express, Inc., 60 F.3d 1551, 1559 (11th Cir. 1995). Defendants' misconduct caused damage to property and the risk of personal injury, albeit a risk not realized by these Plaintiffs. Their misconduct was active. In this Court's view a rational relationship exists between the misconduct and the amount of the award. Having evaluated the reasonableness of the award in this case by evaluating the requisite factors, the Court is satisfied that the award is not unreasonable or excessive. Accordingly, the motion is due to be DENIED to the extent that it is predicated on the contention that the punitive damage award is excessive under Georgia law.

4. Constitutional Principles of Due Process

Having addressed the issues relating to the appropriateness of the amount of punitive damages awarded under Georgia law, the Court will now consider whether the award satisfies the constitutional principles of due process. As an initial matter, the Court finds that both the statutes of Alabama, where Defendants' plant is located, and Georgia, where Defendants' emissions settled, express a strong interest in deterring environmental pollution. This interest supports a substantial punitive damage award.

"In our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (internal citation omitted). Whereas "[c]ompensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . punitive damages serve a broader function; they are aimed at deterrence and retribution." *Id.* (internal citations and quotations omitted). For this reason, there are procedural and substantive constitutional limitations on the imposition of punitive damages; namely, the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* at 416. *See also BMW v. N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to [the state's] interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.").

In reviewing punitive damages awards to ensure that they are based upon an "application of law rather than a decisionmaker's caprice," the United State Supreme Court instructs courts to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. In *State Farm*, the Supreme Court addressed each guidepost in some detail and concluded that the jury's punitive award of $145 million on a $1 million compensatory judgment "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."

The Supreme Court has described the first guidepost–the degree of reprehensibility of the defendant's conduct–to be the "'most important indicium of the reasonableness of a punitive damages award.'" *Id.* at 419 (quoting *Gore*, 517 U.S. at 575). In *State Farm*, the Supreme Court explained:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. (citations omitted). Unmistakably, some types of conduct are more reprehensible than others and therefore more deserving of a substantial punitive damages award. *Gore*, 517 U.S. at 575. For example, negligent conduct is less reprehensible than intentional misconduct, and infliction of economic harm is less reprehensible than infliction of physical harm. *Id.* at 576. Admittedly, the harm inflicted in this case was economic rather than physical. On the other hand, a pattern of misconduct is more reprehensible than individual acts of wrongdoing. *Id.* at 576-77. The evidence before the jury established a pattern of intentional misconduct on the part of

the defendants leading to repeated damage to Plaintiffs' property. This misconduct included bolstering profits rather than remedying known defects with production systems which caused known emissions of carbon black and a less than honest approach to their dealings with Plaintiffs and others damaged by Defendants' conduct. Additionally, the tortious conduct by Defendants evinced an indifference to or a reckless disregard of the health or safety of others given the nature of the materials being put into the environment. While none of Plaintiffs have a claim in this case for physical injury, the Court cannot ignore that emissions of carbon black can pose serious health risks. After considering all of the relevant factors, the Court find that Defendants' culpability is so reprehensible as to warrant the imposition of further sanctions, after having paid compensatory damages, to achieve just punishment and adequate deterrence.

Turning to the second guidepost, the Supreme Court has been reluctant to "identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 425. Although declining to impose a bright-line ratio which a punitive damages award cannot exceed, the Court has recognized that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Citing a long history of providing sanctions of double, treble, or quadruple damages to deter and punish, the Court stated in *State Farm*:

> While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios of 500 to 1 [as in *Gore*], or in this case, of 145 to 1.
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not sur-

> pass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. Where compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

Id. (quotation marks and citations omitted). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426. In this Court's view, the punitive damage award is rationally based on the evidence presented to the jury at trial and intended to punish Defendants in a reasonable and proportionate way. The Court further finds that in light of the evidence the ratio of punitive damages to compensatory damages comports with due process.[6]

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[6] This case involves a single digit multiplier. The ratio of punitive damages to compensatory damages is 9.14:1. The Court notes that in its view the facts of this case could have supported an even higher multiplier. In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999), the Eleventh Circuit Court of Appeals upheld a punitive award of $4.35 million dollars, which was around 100 times the amount of actual damages awarded by the jury, because this amount was "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." 170 F.3d at 1339. The Eleventh Circuit noted that the defendant in *Johansen* was "a large and extremely wealthy international corporation" and that sometimes a "bigger award is needed to attract the . . . attention of a large corporation" in order to promote deterrence effectively. *Id.* at 1338 (internal quotation marks omitted). Thus, a strong state interest in

Under the third guidepost, the Court analyzes the disparity between the punitive damages awarded by the jury in this case and the civil penalties authorized or imposed in comparable cases. "Whether a defendant had constitutionally adequate notice that his conduct might result in a particular damage award depends in large part upon the available civil and criminal penalties the state provides for such conduct." *See, e.g., Johansen*, 170 F.3d at 1337. There may be a lack of adequate notice to the defendant "if the difference between the civil or criminal penalties that were or could have been imposed and the punitive damage award is too great." *Id.* Of course, this Court is mindful that this third guidepost is "accorded less weight in the reasonableness analysis than the first two guideposts." *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004).

Defendants ask the Court to compare the $17.5 million punitive damage award to the civil penalties that could have been imposed by the Alabama Department of Environmental Management ("ADEM") for air pollution pursuant to Alabama Code §§ 22-22A-4 and 22A-5.[7] According to Defendants, those statutes impose a $250,000 cap on the "total penalty [that is] assessed in an order issued by the department." Ala. Code § 22A-5(18)c. Defendants argue that given they have not received a civil penalty from ADEM, the disparity between the punitive damage award and the possible fine by ADEM confirms that they lacked fair notice, as due process requires, that they could be subject to a penalty such as the punitive damages awarded in this case.

In *Johansen*, a case involving nuisance and trespass claims by landowners against a mining company for acidic

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deterrence of a particular wrongful act may justify ratios higher than might otherwise be acceptable. *Id.*

[7] Defendants did not receive fines from ADEM. There was testimony and evidence presented at trial that Defendants were "tipped off" by ADEM prior to plant inspections.

water that had escaped from the mining operation, the Eleventh Circuit Court of Appeals approved a punitive damage award that was 400 times greater than the fine the mining company had received and 100 times greater than the maximum penalty that could have been imposed. 170 F.3d at 1337-39. In light of this precedent, the Court is satisfied that the possible civil penalty under Alabama law of $250,000 provided Defendants with adequate notice that their conduct could result in a substantial penalty for pollution. Indeed, it would seem that even if a much larger punitive damage award had been returned by the jury, this factor would have supported finding that it did not offend due process.

In sum, the Court finds that the facts of this case clearly support a very significant award of punitive damages. The Court cannot find on the record before it that the punitive damages award in this case is unconstitutionally excessive. This Court does not agree with Defendants' contention that the punitive damages award offends due process. Accordingly to the extent that Defendants' motion seeks a new trial, remittitur, or any other reduction of the punitive damages award in this case, their motion is due to be DENIED.

CONCLUSION

The Court has carefully considered the evidence in this case and the arguments in support of and in opposition to the instant motion pursuant to the applicable legal standards. It is hereby ORDERED that Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 248) is DENIED.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court, M.D. Alabama,
Eastern Division.
ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTAL CARBON, INC., et al., Defendants.
No. 3:01-CV-994-MEF

INJUNCTIVE RELIEF ORDER

Plaintiffs in this suit have sought both damages, which were awarded to them by the jury on August 25, 2004, and permanent injunctive relief. After the jury returned its verdict for the plaintiffs, the Court received additional evidence and briefs on the issue of permanent injunctive relief. Following these additional submissions, the Court heard the oral arguments of the parties.

Based on the record before it, the Court found that the plaintiffs had established that a permanent injunction was warranted. The Court then reopened discovery and expert identification in the case on the limited issues relating to the crafting of a permanent injunction which would be adequately tailored to the legal violations adjudged in this case. The Court further directed that it would be necessary for the parties to make additional submissions on the issue of specific injunctive relief after this discovery was completed and that the Court would, if necessary, conduct further hearings after receiving the evidence and arguments of the parties so that it could draft an injunction specific in its terms and reasonably descriptive in its details as required by Federal Rules of Civil Procedure 65. The Court also directed the parties to attempt to settle the issue of the scope of injunctive relief.

The Court has been advised that the parties have reached an agreement on the specific terms of injunctive relief and that the parties have acknowledged their willingness to be bound by the foregoing provisions of this permanent injunctive relief Order (this "Order").

WHEREFORE, IT IS HEREBY ORDERED, that the defendants shall comply with the following requirements and terms of permanent injunctive relief in this cause:

1. Jurisdiction

Solely for the purposes of this Order, the parties have agreed to waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this judicial district. The parties have further agreed that they shall not challenge the terms of this Order or any other injunctive relief order entered to date or contest the Court's jurisdiction to enter and enforce said orders.

2. Parties Bound

This Order shall be binding upon the parties and their successors and assigns. Defendants have assured the Court that there are no present or currently anticipated financial limitations which would prevent them from meeting their obligations under this Order. This Order relates exclusively to CCC's[1] manufacturing facility located in Phenix City, Alabama and imposes no obligations whatsoever on any other facility controlled by Defendants

3. Replacement of the Unit 1 Main Bag Filter System

The ten compartments of the Main Bag Filter shall be demolished and replaced with six custom designed 316L stainless steel Pulse Jet technology bag filter compartments to be fabricated by Davco Fab, Incorporated to Defendants' specifications.

The new compartments will be installed two at a time, in three phases. In addition to the replacement of the compartments, CCC shall replace the existing equipment of the Main Bag Filter System with the following: stainless steel cage and membrane filter bags or filter bags of a similar or superior quality, new insulation on all compartments, new rotary air-

[1] Continental Carbon Company, Inc. is referred to throughout this Order as "CCC."

locks and stainless steel pneumatic piping, new inlet and outlet piping, and new on site foundation, structure, platform, instrumentation and electrical mechanisms. Defendants have represented to the Court that Phase I of this replacement has been completed as of the date of this Order. Phase II shall be completed no later than September 30, 2005. Phase III shall be completed on or before July 31, 2006.

4. Repair of the Unit 1 Exhaust Bag Filter System

Defendants shall conduct a daily visible emission inspection to ensure that it is in proper working order, to determine compliance with the ADEM operating permit in accordance with EPA procedures and shall maintain a log of these activities which will be available for review by Plaintiffs. If at any time the Unit 1 Exhaust Bag Filter System is found to have a failure, the compartment or compartments shall be shutdown and not restarted until the repairs have been completed and they are functioning properly. In addition, Defendants shall agree to complete the following by no later than June 30, 2006: (i) replace all applicable cages with stainless steel cages in pulse jet compartments and replace the filter bags in each compartment of the Unit 1 Exhaust Bag Filter System with new membrane filter bags or filter bags of a similar or superior quality for that application, (ii) repair and restore insulation on the exterior of the Unit 1 Exhaust Bag Filter System in "as new" condition, and (iii) replace all Unit 1 Exhaust Bag Filter System rotary airlocks.

5. Continuous Video Monitoring

Defendants shall install and continuously operate video surveillance cameras at their Phenix City plant, trained on the following potential emission point sources:

a. Unit 1 main bag filter stack and one side of the bag filter housing;

b. Unit 1 exhaust bag filter stack and one side of the bag filter housing;

c. Unit 1 clean up bag filter stack and one side of the bag filter housing;

d. Unit 2 main bag filter stack and one side of the bag filter housing;

e. Unit 2 exhaust bag filter stack and one side of the bag filter housing;

f. Unit 2 clean up bag filter stack and one side of the bag filter housing;

g. The thermal oxidizer stack; and

h. Clean up bag filter housing in trans-loading area.

In addition, the defendants shall install at least two (2) additional video surveillance cameras at the Phenix City plant at the southeast and northeast corners at the perimeter of the plant facility, covering the plant production units and thermal oxidizer. All cameras at the plant shall operate 24 hours a day, seven days a week, 365-days a year during normal operations. Sufficient lighting shall be installed to permit adequate video images, weather permitting, of each specific location identified in sections a. through h. above during each hour of every shift (24 hours a day) during normal operations. Video or digital media storage of the images generated by these cameras shall be maintained by the defendants for three months. Copies of videos shall be furnished to the plaintiffs upon their written request. The continuous video monitoring system shall be fully functional 90 days from entry of this Order.

6. Air Monitoring

Defendants shall install two fine particulate matter (PM2.5) monitors on the boundaries of the plant property in a direction southeast of the plant and northeast of the plant. The monitors shall be positioned at a height of no less than six (6) feet and no more than ten (10) feet. The monitors shall be positioned in an area where no natural or man-made obstructions exist between the plant's potential emission point sources and the air monitoring equipment. Twenty-four hour

air monitor samples shall be collected everyday and logged and stored properly for a period of seven (7) days from collection. Samples older than seven (7) days may be discarded. Defendants shall bear the costs associated with these sample collection procedures.

Air monitoring samples shall be made available to Plaintiffs for testing or analysis whenever counsel for Plaintiffs provides counsel for Defendants with a written request for same within six (6) days of the sample collection date. All costs associated with the analysis of any sample by Plaintiffs shall be borne by Plaintiffs. Defendants will bear the expense of any sample analysis they choose to perform. A copy of any laboratory report generated by either party as a result of said analyses shall be furnished to the opposing party.

7. Progress Reports

CCC shall file with the Court progress reports on July 31, 2005, and July 31, 2006, reporting on compliance with the terms of this Order. Plaintiffs (and any experts employed by Plaintiffs) will be authorized to inspect, review, photograph and/or videotape any equipment changes, improvements or repairs made pursuant to Paragraphs 3 and 4 herein under this Order within 14 days following the submission of the aforementioned progress reports by the defendants. Plaintiffs and/or their experts will be given complete access to the plant facilities (and subject equipment) and invoices, plans, schematics, diagrams, photos, and engineering studies/reports that relate to the equipment changes, improvements or repairs made pursuant to paragraphs 3 and 4 of this Order upon receipt of a written request by counsel within 14 calendar days following the submission of a progress report by Defendants. Within 14 calendar days following Plaintiffs' inspection and receipt of documents, Plaintiffs may file with the Court any objections, comments or assessments they may have on the progress reports submitted by Defendants under this Order. Defendants shall have the right to file a response to any filing

by Plaintiffs in connection with a progress report within 14 calendar days of Plaintiffs' filing.

8. Reimbursement of Attorneys' Fees and Costs Incurred by Plaintiffs in the Pursuit of Injunctive Relief

Defendants have agreed to pay and plaintiffs have agreed to accept the sum of $500,000.00 in full satisfaction of its claim for attorneys' fees and costs incurred in the pursuit of this injunctive relief since the date of the jury's verdict in this cause on August 25, 2004. The parties agree that the payment of this sum is not intended to satisfy any aspect of the jury verdict. The parties further agree that the payment of this sum does not constitute a waiver of Defendants' right to appeal the jury's award of attorneys' fees and costs in this matter.

By consenting to this Order, Defendants do not waive their right to appeal any other issue in this case except the injunctive relief expressly provided in this Order and the Court's jurisdiction and authority to enforce said Order. In particular, Defendants do not waive their right to appeal any issue pertaining to the final judgment as to claims submitted to the jury entered January 31, 2005, nor do they waive the right to appeal any issue respecting the jury's liability, damages, or attorney's fees awards in this or any other case. This Order in no way precludes an appeal of these issues, nor does it constitute an admission that Defendants are liable to Plaintiffs on the claims submitted to the jury, that Plaintiffs are entitled to recover damages, that the amount of damages awarded in this case was proper, or that Plaintiffs are entitled to recover the attorneys' fees awarded by the jury.

This Order shall expire, and the parties shall have no further obligations hereunder, on January 1, 2007, unless Plaintiffs petition for, and the Court grants, an extension of this Order. Defendants may oppose any such petition.

The parties have expressly agreed that the Court shall continue to have jurisdiction over this matter in order to enforce, oversee and ensure the parties' full compliance with and, implementation of, the terms of this Order until the Order expires.

If circumstances arise such that Plaintiffs believe that, after the date of this Order, there have been new depositions of carbon black on their property and that Defendants are responsible for the depositions, Plaintiffs shall, prior to the filing of any lawsuit, notify Defendants of the alleged depositions of carbon black. Upon receipt of such notification, the parties shall have thirty (30) days to meet and confer to see if a mutually agreeable resolution of the issues can be reached. This meet and confer obligation shall not, in any way, prejudice the rights of any of the parties with respect to the pursuit or defense of any claims based upon any alleged future deposition of carbon black.

DONE this the 5th day of July, 2005.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-11311-DD

May 18, 2007

ACTION MARINE, INC,
JOHN THARPE, et al.,

Plaintiffs-Appellees

versus

CONTINENTAL CARBON INCORPORATED,
CHINA SYNTHETIC RUBBER CORPORATION,

Defendants-Appellants

Before: DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

PER CURIAM:

The Petition for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

*Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

APPENDIX E

United States District Court, M.D. Alabama,
Eastern Division.
ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTAL CARBON, INC., et al., Defendants.
No. 3:01-CV-994-MEF

FINAL JUDGMENT AS TO CLAIMS SUBMITTED TO JURY

Pursuant to Federal Rules of Civil Procedure 54(b) and 58 and in accordance with the prior proceedings, opinions, and orders of the Court, it is the ORDER, JUDGMENT, and DECREE of the Court that:

(1) Consistent with the verdict of the Jury on August 25, 2004, as set forth in the Verdict Form (Doc. # 216) and the Supplemental Verdict Form (Doc. # 217), judgment is entered in favor of Plaintiffs and against Defendants on the claims submitted to the jury.

(2) Costs are taxed in favor of Plaintiffs and against Defendants, for which execution may issue.

(3) The Clerk of the Court is DIRECTED to entry [sic] this document on the civil docket as a final judgment on those claims pursuant to Federal Rules of Civil Procedure 54(b) and 58) [sic].

DONE this the 31st day of January, 2005.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F
ADDITIONAL STATUTORY PROVISIONS

Section 13-6-11 of the Georgia Code provides: "The expenses of litigation generally shall not be allowed as a part of the damages; but * * * where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them."

Section 22-22A-5(18)(c) of the Alabama Code provides in relevant part: "Any civil penalty assessed or recovered under paragraph a. or b. of this subdivision shall not be less than $100.00 or exceed $25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the department under paragraph a. of this subdivision shall not exceed $250,000.00. Each day such violation continues shall constitute a separate violation for purposes of this subdivision. In determining the amount of any penalty, consideration shall be given to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty."